(2)

No. 03-9168

SUPREME COURT, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX VOLUME I

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August 27, 2004

PETITION FOR CERTIORARI FILED FEBRUARY 23, 2004
CERTIORARI GRANTED JUNE 21, 2004

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UNITED STATES PROBATION OFFICE
BOSTON, MASSACHUSETTS

Case No. 1:98-cr-10262-NG

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant-Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/12/1998	1	INDICTMENT returned Reginald Shepard (1) count(s) 1 . (sad) (Entered: 08/13/1998)
09/14/1998	8	Mag. Judge Zachary R. Karol . CLERK'S NOTES as to Reginald Shepard , re: arraignment held; defendants pleads not guilty to all counts, court sets schedule, issues standing order. , set Discovery Motions deadline to 10/6/98 for Reginald Shepard , Response to discovery motions due 10/20/98 motion Detention hearinf held: Govt enters exhibits 1-4 calls witness 1, direct cross, witness 2, agent Crowley, direct cross, Witness 3 direct cross, matter taken under advise,emt. ; Court Reportedr: Owens (jdj) (Entered: 09/24/1998)
09/15/1998	5	Mag. Judge Zachary R. Karol . ORDER entered for detention as to Reginald Shepard Bond set to NO BAIL for Reginald Shepard. (fmr) (Entered: 09/16/1998)

DATE	NO.	PROCEEDINGS
09/24/1998	9	Judge Nancy Gertner . ORDER entered as to Reginald Shepard :, set pretrial conference for 2:30 11/16/98 for Reginald Shepard , set Jury trial for 9:00 11/23/98 for Reginald Shepard , set Jury trial for 9:00 11/23/98 for Reginald Shepard . (fmr) (Entered: 09/24/1998)
03/03/1999	26	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re: change of plea; Plea of Guilty entered. Procedural order entered. Sentencing set for 5/27/99 at 3:00. Any memos to be filed on or before 5/21/99. Dft returned to custody of USMS ; Court Reporter: Hagopian (fmr) (Entered: 03/10/1999)
07/06/1999	30	Objection by Reginald Shepard as to Reginald Shepard to Governments objections to the presentence report , filed. (fmr) (Entered: 07/06/1999)
07/07/1999	31	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , ;, reset Sentencing for 9:30 7/14/99 for Reginald Shepard Notes: Sentencing continued until 7/14/99 at 9:30 a.m. Court Reporter: Hagopian (ktb) (Entered: 07/08/1999)
07/14/1999	34	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re disposition. . Court Reporter: Hagopian (fmr) (Entered: 08/09/1999)

DATE	NO.	PROCEEDINGS
08/06/1999	35	Judge Nancy Gertner . JUDGMENT entered Reginald Shepard (1) count(s) 1. Defendant is sentenced to 46 months. Defendants is to participate in a 500 hour program. Supervised release of 36 months. Standard and special conditions apply. Special assess ment of 50.00 imposed. (fmr) (Entered: 08/09/1999)
09/03/1999	36	Sentencing...Transcript of proceedings held on 7/7/99 hearing date: before Judge: Gertner, as to Reginald Shepard , filed. (mcm) (Entered: 09/03/1999)
09/03/1999	37	Sentencing hrg ..... Transcript of proceedings held on 7/14/99 hearing date: before Judge: Gertner, as to Reginald Shepard , filed. (mcm) (Entered: 09/03/1999)
09/03/1999	38	NOTICE OF APPEAL by USA as to , filed. Reginald Shepard (1) count(s) 1 Appeal record due on 10/3/99 for Reginald Shepard (fmr) (Entered: 09/07/1999)
09/27/1999	40	SENTENCING MEMORANDUM as to Reginald Shepard , filed. (fmr) (Entered: 09/30/1999)
01/20/2000	43	AMENDED SENTENCING MEMORANDUM as to Reginald Shepard , filed. (fmr) (Entered: 01/21/2000)
01/09/2001	49	MANDATE OF U.S. Court of Appeals as to Reginald Shepard ; re: [38-1] appeal ; remanding for resentencing Reginald Shepard (1) count(s) 1 (jr) (Entered: 01/09/2001)

DATE	NO.	PROCEEDINGS
02/06/2001	53	Memorandum by Reginald Shepard Re: proceedings on remand (fmr) (Entered: 02/07/2001)
02/09/2001	55	Memorandum by USA as to Reginald Shepard Re: re sentencing procedure (fmr) (Entered: 02/12/2001)
03/12/2001	57	Memorandum by Reginald Shepard Re: re-sentencing procedure (fmr) (Entered: 03/13/2001)
03/23/2001	58	Memorandum by USA as to Reginald Shepard Re: apprendi v NJ (fmr) (Entered: 03/26/2001)
03/26/2001	59	Copy of NOTICE of filing of writ of cert , filed. (fmr) (Entered: 03/26/2001)
12/12/2001	61	SUPPLEMENTAL SENTENCING MEMORANDUM by Reginald Shepard, filed. c/s (Affidavit attached) (jf) (Entered: 12/12/2001)
12/13/2001	62	AFFIDAVIT of Reginald Shepard, , re: Resentencing Matters, filed in open court. (jf) (Entered: 12/14/2001)
12/13/2001	67	Judge Nancy Gertner. CLERK'S NOTES as to Reginald Shepard re: re-sentencing Government will file an opposition to defendant's sentencing memo 12/24/02, Reset Sentencing for 2:30 1/11/02 for Reginald Shepard ; Court Reporter: Hagopian (jf) (Entered: 01/11/2002)
12/13/2001	64	Memorandum by USA as to Reginald Shepard Re: after remand for re-sentencing procedure. c/s (jf) (Entered: 01/03/2002)

DATE	NO.	PROCEEDINGS
01/03/2002	65	RESPONSE by Reginald Shepard in opposition to [63-1] motion seeking permission to cite unpublished decision , filed c/s (jf) (Entered: 01/03/2002)
01/09/2002	66	Transcript of proceedings held on 12/13/01 hearing date: before Judge: Gertner, as to Reginald Shepard , Court Reporter: Harold M. Hagopian, filed (jf) (Entered: 01/09/2002)
01/11/2002	68	Judge Nancy Gertner . CLERK'S NOTES as to Reginald Shepard , re: re-sentencing; ; Court Reporter: Hagopian (jf) (Entered: 01/16/2002)
01/23/2002	69	Judge Nancy Gertner . AMENDED JUDGMENT ENTERED: Reginald Shepard (1) count(s) 1. Defendant is sentenced to 46 months. Defendant is to participate in a 500 hour program. Supervised release of 36 months. Standard and special conditions apply. Special assessment 0f 50.00 imposed. AMENDED JUDGMENT. The defendant pleaded guilty to count(s):1. It is ordered that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately. It is further ordered that the defendant shall notify the US Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessment imposed by this judgment are fully paid. IMPRISONMENT – The defendant is hereby committed to the custody of the US Bureau of Prisons to be

DATE	NO.	PROCEEDINGS
		imprisoned for a term of 46 months on Count I. SUPERVISED RELEASE – Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. The defendant shall not possess a firearm as defined in 18 U.S.C. sec 921. Standard Conditions of Supervision apply. Special Conditions of Supervised Release – Defendant is prohibited from possessing a firearm or other dangerous weapon; defendant is to participate in a program for substance abuse as directed by the US Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs; defendant is to participate in a mental health program as directed by the US Probation Office; defendant is to participate in a Certified Batterer's Intervention Program, as directed by the Probation Office. . (jf) (Entered: 01/29/2002)
01/23/2002	70	Judge Nancy Gertner. Memorandum Re: Re-Sentencing entered. "…. On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA. Therefore, the original sentence I imposed on 7/14/99 (46 months on Count I), was re-imposed on 1/11/02, for the reasons stated above. So Ordered." Notice sent to counsel.[EOD Date 1/29/02] (jf) (Entered: 01/29/2002)

DATE	NO.	PROCEEDINGS
01/23/2002	71	Judge Nancy Gertner . Statement of reasons as to Reginald Shepard (jf) (Entered: 02/13/2002)
02/19/2002	72	NOTICE OF APPEAL by USA as to sentence imposed on 1/11/01, Memorandum Re: Re-sentencing 1/23/02 and Amended Judgment 1/29/02, filed. Reginald Shepard (1) count(s) 1 Appeal record due on 3/6/02 for Reginald Shepard. (jf) (Entered: 02/19/2002)
05/28/2002	73	Transcript of resentencing proceedings held on January 11, 2002 hearing date: before Judge: Gertner, as to Reginald Shepard , Court Reporter: Harold Hagopian, filed. (jf) (Entered: 05/29/2002)
11/03/2002	75	Request for Issuance of Arrest Warrant after Remand as to Reginald Shepard by USA. c/s(Filo, Jennifer) (Entered: 11/10/2003)
11/07/2003	74	JUDGMENT of USCA (certified copy) as to Reginald Shepard re 72 Notice of Appeal – Final Judgment; This cause came on the be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The sentence of the district court is vacated, and the matter is remanded for re-sentencing in conformity with the opinion issued this day. (Ramos, Jeanete) (Entered: 11/07/2003)

DATE	NO.	PROCEEDINGS
11/07/2003	76	OPPOSITION by Reginald Shepard re 75 Government's Request for Arrest Warrant after Remand, filed. c/s (Filo, Jennifer) (Entered: 11/13/2002)
01/08/2004	77	ORDER of USCA (certified copy) as to Reginald Shepard re 72 Notice of Appeal – Final Judgment; On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for CERTIORARI and, if a timely petition for CERTIORARI is filed, pending a resolution of the petition by the Supreme Court. If the petition for CERTIORARI is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk of this court both of the filing of any such petition for CETIORARI and its disposition. IT IS SO ORDERED. (Ramos, Jeanette) (Entered: 01/08/2004)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2167

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/21/99	CRIMINAL CASE docketed. Opening forms sent. Notice filed by Appellant US. Transcript Report/Order due 11/4/99. [99-2167] (eiln)
10/21/99	Transcript(s) filed by court reporter Harold M. Hagopian transcript # 39 court reporter Pamela R. Owens transcript # 10. [99-2167] (eiln)
10/21/99	TRANSCRIPT REPORT/ORDER filed by Appellee Reginald Shepard. Transcript has been ordered. Court Reporter has indicated the transcript will be ready by 10/21/99. [99-2167] (eiln)
5/12/00	CASE ARGUED 05/12/00. Torruella, Ch. J., Lipez, Keeton, JJ. (ceca)
11/13/00	OPINION issued. Torruella, Chief Judge, Lipez, Circuit Judge, and Keeton, District Court Judge of the the District of Massachuetts, sitting by designation. Signed Judge Kermit V. Lipez, Authoring Judge PUBLISHED [514069-1] [99-2167] (turn)

DATE	PROCEEDINGS
11/13/00	JUDGMENT entered closing case. The sentence of the of the district court is vacated and the matter remanded for further proceedings not inconsistent with the opinion filed this day. [514077-1] [99-2167] (turn)
11/27/00	PETITION filed by Appellee Reginald Shepard for panel rehearing. [525853-1] Certificate of Service dated 11/26/00. [99-2167] (eiln)
12/19/00	ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Robert E.Keeton. motion for rehearing addresses a jurisdictional issue raised by appellee on appeal but not addressed explicitly in the panel's decision. Petitioner stated that the relevant provision of the jurisdictional statute invoked by the government provides for appellate review of "an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. 3742(b). The petition argued that the district court's ruling in this case was discretionary, and that the panel opinion thus does not correct a violation of law. This is not the case. As the panel opinion makes clear, the district court made a legal ruling. There was jurisdiction to hear the appeal under 3742(b). The petition for panel rehearing is denied. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges voting that the case not be heard en banc, it is ordered that the petition for rehearing en banc be denied.* (eiln)

DATE	PROCEEDINGS
1/9/01	MANDATE ISSUED. [99-2167] (laur)
1/9/01	RECORD returned to originating court. Vol-1 & Transcripts. (laur)
3/22/01	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on [546221-1] 3/16/01. Supreme Court case number: 00-8998. [99-2167] (lina)
10/1/01	U.S. SUPREME COURT ORDER denying petition for writ of certiorari, filed in the Supreme Court on 10/01/01. [99-2167] (eiln)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1216

UNITED STATES,

Appellant,

v.

REGINALD SHEPARD,

Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
2/22/02	CRIMINAL CASE docketed. Opening forms sent. Notice filed by Appellant US. Appearance form due 3/8/02. Docketing Statement due 3/8/02. Transcript Report/Order due 3/8/02. [02-1216] (liona)
2/22/02	RECORD filed: 1 vol(s). Transcript(s) filed by Pamela Owens, Transcript No. 10 of Arraignment and Detention Hearing, September 14, 1998 and by Harold M. Hagopian. Transcript, No. 36, of Sentencing, July 7, 1999. Transcript, No. 37 of Sentencing, July 14, 1999. No. 39 of Sentencing, March 3, 1999. Transcript No. 66 of Resentencing, December 13, 2001. [636503-1] [02-1216] (lina)
11/3/03	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Kermit V. Lipez, Signed, Chief Judge Michael Boudin, Authoring Judge. PUBLISHED. [805555-1] [02-1216] (lina)

DATE	PROCEEDINGS
11/3/03	JUDGMENT entered Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Kermit V. Lipez. The sentence of the district court is vacated, and the matter is remanded for re-sentencing in conformity with the opinion issued this day. [805556-1] [02-1216] (lina)
11/17/03	PETITION filed by Appellee Reginald Shepard for panel rehearing and [809917-1] for rehearing en banc. [809917-2] [02-1216] Certificate of Service dated 11/17/03. [02-1216] (kris)
11/24/03	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc, It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied. [02-1216] (lina)
12/1/03	(Faxed) MOTION filed by Appellee Reginald Shepard for stay of issuance of mandate pending filing of petition for certiorari. Certificate of service dated 12/1/03. [02-1216] (lina)
12/2/03	ELECTRONIC DOCUMENT, Motion of appellee to stay mandate, filed by Appellee Reginald Shepard. [02-1216] (lina)

DATE	PROCEEDINGS
12/31/03	ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, and Judge Kermit V. Lipez. On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for certiorari and, if a timely petition certiorari is filed, pending a resolution of the petition the Supreme Court. If the petition for certiorari is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk this court both of the filing of any such petition for certiorari and its disposition. It is so ordered. to stay mandate. [822622-1] [02-1216] (turn)
2/24/04	PUBLIC NOTE: Appellee Reginald Shepard's Notice of Filing of Petition for Certiorari filed by Attorney Linda J. Thompson in accordance with this Court's order of 12/31/03. [02-1216] (lina)
3/12/04	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on [846798-1] 02/23/04. Supreme Court case number: 03-9168. [02-1216] (lina)
6/23/04	Appellee Reginald Shepard's notice of grant of Petition for Certiorari (on 6/21/04) filed. Certificate of service dated 6/22/04. [881164-1] [02-1216] (lina)
6/25/04	U.S. SUPREME COURT ORDER. The Court today entered the following order in the above-entitled case: The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certitorari are granted. [02-1216] (mlyn)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 98 CR 10262

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

---

18 U.S.C. § 922(g)(1)
(Felon in Possession of a Firearm)

INDICTMENT

COUNT ONE: 18 U.S.C. § 922(g) (1)—Felon in Possession of a Firearm

The Grand Jury charges that:

On or about Ocotber 17, 1995, at Boston, in the District of Massachusetts,

REGINALD SHEPARD,

the defendant herein, having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess, in and affecting commerce, a firearm and "ammunition, to wit: a Glock, model 17, 9 mm pistol, bearing the serial number DD567US; and 17 rounds of 9 mm ammunition bearing the head stamp "F C 9 MM LUGER"; and 13 rounds of 9 mm ammunition bearing the head stamp "E L D 9 mm" and 3 rounds of 9mm ammunition bearing the head stamp "R P 9 mm LUGER".

All in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

/s/ [ILLEGIBLE]
FOREPERSON OF THE GRAND JURY

/s/ Nadine Pellegrini
NADINE PELEGRINI
Assistant United States Attorney

DISTRICT OF MASSACHUSETTS August 12, 1998, at 2:58 p.m.

Returned into the District Court by the Grand Jurors and filed.

/s/ [ILLEGIBLE]
Deputy Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

vs.

REGINALD SHEPARD

Boston, Massachusetts
July 7, 1999

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER,
U.S. DISTRICT JUDGE

APPEARANCES:

For the Government: NADINE PELLEGRINI
Assistant United States Attorney
District of Massachusetts

For the Defendant: LINDA J. THOMPSON, ESQ.
Jacobson & Thompson, P.C.
1331 Main Street
Springfield, MA 01103

U.S. Court Reporter: HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * *

[3] THE COURT: * * *

Ms. Pellegrini, do you want to tell me what your recommendation is; but you can also make the argument about the violent felony issue, which is what I was struggling with for the past hour.

MS. PELLEGRINI: Certainly, your Honor. Actually, it is a little difficult to make a recommendation when there's such a disparity between what the guideline range is right now and what the guideline range would be.

THE COURT: Well, let's make sure we're on the same page. If I do not find armed career criminal status, then Mr. Shepard is in the 30 to 37 range, everyone agrees?

MS. PELLEGRINI: Yes, that's correct, according to [4] the PSI.

THE COURT: 30 to 37 months. And if I find career criminal, then Mr. Shepard is 15-year mandatory minimum, is it?

MS. PELLEGRINI: Yes, your Honor.

[9] And as I go through the documents and the particular crimes that we're talking about, I present to the Court those incidents and those findings from that which allow the Court to find that, in fact, these were crimes of violence as defined in that particular section, in 924(e)(2)(B).

For example, the first one we talk about actually comes from the PSR itself, and that indicates that, in fact, the defendant did break and enter the Crispus Attucks Children Center and removed property. But it also indicates [10] that the director of that center was in fear as a result of that break-in.

THE COURT: No, but that's what I wanted to separate out. Is it that you're saying the burglary of a dwelling is

sufficient to get you over the 924(e)(2) hump? Only the dwelling? You just have to show dwellingness?

MS. PELLEGRINI: Yes, but that—

THE COURT: Or do you have to show, in addition, dwelling plus someone put in fear?

MS. PELLEGRINI: No. Actually, I think that—the reason that I focused on that particular one was because it was a commercial structure; but that it presented a serious potential risk of physical injury to another by the fact that persons were present, and, therefore—

THE COURT: So, it's not dwelling. It's persons were present?

MS. PELLEGRINI: Persons were present. But given a dwelling, given the fact that a person more than likely would be present, I think that a dwelling normally would be considered a crime of violence because of that potential risk.

THE COURT: Now, under 4B1.2, under the guidelines for career offender, burglary of a dwelling under the commentary is a crime of violence. And the question is whether or not that applies—that analysis applies as [11] well.

And what you're saying here is that—I want to break this down as to what it is we're looking for and then what the data is that supports it. What we're looking for, as far as you're concerned, is burglary of a dwelling, period, because there's a risk that people will be in a dwelling, and, therefore, that violence will result.

And then you're saying go through the presentence reports—or, rather, go through the police reports or go through the indictment or go through the charging papers to see if we have a dwelling.

If you're saying no, or if the defendant is saying no, you have to show that somebody was actually put in fear, then

that's an enterprise that requires the same thing, to some degree. But it's less likely that in the charging papers you're going to find so-and-so was actually put in fear.

In other words, the indictment for burglary is more likely to include the site of it on the indictment, to which the defendant pleads guilty, than who was threatened.

And that involves more of the archeological dig that the Court in Dueno was talking about.

MS. PELLEGRINI: Your Honor, I hesitate to say that—I do believe that a breaking and entering into a dwelling would necessarily be a violent felony, as defined [12] under 924(e)(2)(B), because it requires not that someone actually be placed, but that it only requires a serious potential risk.

THE COURT: So, are you taking the position, then, that dwellings—that anyone who breaks—

MS. PELLEGRINI: Breaks into a dwelling—

THE COURT:—and enters involves—

MS. PELLEGRINI: Yes, presents a serious potential risk of injury.

THE COURT: And so you point to—you're still—in order to get—the charging papers in each of these convictions still use the generic language of the statute, and so you get to the dwelling part by looking at police reports; is that right?

MS. PELLEGRINI: In some cases they are police reports, in some cases they are the application for the complaint; but they are the documents that were in the district court's file, the court that actually took the plea.

THE COURT: The district court's file doesn't persuade me. There's all sorts of stuff in my file that are really nothing more than allegations that no one has litigated.

MS. PELLEGRINI: Well, I think what I'm getting at, your Honor, is if we're saying—okay, we have this [13] problem with generic language, because the title to this particular statute, 266, 18 or 16, throws in basically three or four different things—buildings, vessels, ships—maybe it's just the three. Then, if we have before us the information that, in fact, we have a street address and a cellar door was broken into it, we know we're not dealing with a vessel or a ship. We know we're not dealing with a vehicle—that's the other one—because a vehicle presents a problem, according to the Court of Appeals prior decisions when they were looking at whether or not a B and E would be a crime of violence.

But, since we have this information, we can exclude the nonviolent felony aspects of the B and E because we have this information.

So that these are, in fact, violent felonies. They should be considered as such. He has at least five. And he should be sentenced with those five violent felonies in his record, which makes him an armed career criminal.

THE COURT: If I don't go that way, would you move for an upward departure, because we're already at the top, but—

MS. PELLEGRINI: We're already at the top.

THE COURT:—there are ways of going beyond that on the ground that the criminal history understates his record?

[14] MS. PELLEGRINI: Your Honor, I have considered that and I've actually talked about that with the Probation Department regarding, you know, where our range would be. My concern is that, as a policy, I don't think that we—we as the United States Attorney's Office, want to see all B and E's sort of excluded from the consideration of whether or not they are a crime of violence because of what some perceive to be the language of Dueno, the prohibition of Dueno, when we don't see that as a prohibition at all.

THE COURT: What I see Dueno as doing, which is not inappropriate—just the general framework here, the government bears the burden of upward departures, of essentially upward departures. And here it has to be a burden that we'll take very seriously, because it's the different between, what is it, three years, or three or four years, and 15 years.

MS. PELLEGRINI: Fifteen.

THE COURT: So it's an enormous difference. And it seems to me that what Dueno reflects is a concern for relitigating in federal court crimes that—convictions that have taken place in state courts. Our trying to figure out exactly what someone was convicted of based on a record which has not been litigated by anyone. It was certainly not challenged by the defendant at the time when it would have been meaningful to challenge.

[15] And it sometimes involves reconstructing. And they talk about an archeological dig. We have to be concerned. You're reconstructing stuff from five, six, seven years ago. So it is a difficult process reconstructing information from five, six, seven years ago that is going to have a consequence on ten years of this man's life.

So, I think that the framework of Dueno is appropriate and serious. It also is concerned—goes along with the Supreme Court's decisions in *Taylor v. United States*, which talks about a categorical approach, and I think reflects this notion that where do I come off trying to figure out what was really going on in the state court based on inadequate, undocumented, unlitigated facts.

Nonetheless, the argument in this motion, or narrow argument that I understood from what I was reading, was that you're not saying—you're not looking at the putting in fear part. Does it matter that Mrs. Jones was put in fear, that I have to find that. You're saying that all I'd have to find

is that it's reasonable from this record that a dwelling was involved.

Now, is the U.S. Attorney's Office prepared to take the general position that whenever a dwelling is involved it is a crime of violence?

MS. PELLEGRINI: Yes, because that would present a [16] potential serious risk of physical injury to the inhabitants.

THE COURT: And that, therefore, on these facts, since the address is not—doesn't take—the address where this took place is virtually uncontested in these documents, and the address itself connotes a dwelling—

MS. PELLEGRINI: That's right.

THE COURT:—that I can go by that?

MS. PELLEGRINI: Because, your Honor, from what the Court just said, you know, trying to put together what happened, trying to piece together what happened, in these particular cases we're not dealing with a situation in each one of these convictions where Mr. Shepard was charged both with B and E and let's say an assault and battery or something else, and we can't tell what he pled to, and, therefore—but we have no idea.

In each of these cases, we no that there's a conviction, whether 266 either 16 or 18, of breaking and entering. The question is, is it breaking and entering a building? And then, what type of building? Or is it a vehicle, which causes a problem, or is it a ship or a vessel, which apparently also causes a problem?

What I'm saying is this information, obviously—there's no reason to believe that the conviction was anything else other than the breaking and entering of the [17] particular place in question. The Court did not accept a plea when the Crispus Attucks Center was broken into on that particular street to

breaking and entering of a vehicle or breaking and entering of a ship or a vessel.

And so, what I'm saying is there isn't much for the Court to do to determine that, because we have what was before the district court that took the plea.

THE COURT: Although this is exactly what was involved in Dueno.

MS. PELLEGRINI: But not necessarily, because what they're saying is—in Dueno they're saying we didn't—the record in those lacks even a single document that was before the judge that who accepted the plea. And they say that the account that they have from the PSR apparently took it's account from the police report, but it didn't have if police report.

THE COURT: But then the next sentence says "Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted either by a trier of fact or by his own admission."

So that is a substantial narrowing sentence, because then it says, "The colloquy has to comprise, for example, what we do in this Court," which is what are the facts that you're saying you did. And unless you can—unless you can take all of this together and tie it to [18] either what someone tried or his own admission, we can't rely on it.

And that, put in the context of the Taylor decision and of the other case, which is floating around here—is it Damon?

MS. PELLEGRINI: Damon.

THE COURT: United States versus Damon, which again talks about the troubling aspects of reconstructing state offenses.

I mean, do you agree with me that Dueno was exactly—if what you described is so easy to do, namely, where did this

crime take place, why is it so difficult for the First Circuit to do it in Dueno? They're making exactly the same decision that I am being charged with making.

MS. PELLEGRINI: I don't think so, your Honor, because I think that their record was less than what the Court has now.

THE COURT: Because you have given me a presentence report—I mean applications for complaints?

MS. PELLEGRINI: Because I have given you what—I know what the Court is saying about what a file is, but what the Court of Appeals was complaining about, not knowing what the District Court had in front of it, we now know that the district court had at least what's supposed to be in front of it.

[19] THE COURT: Right.

MS. PELLEGRINI: Whether or not the district court looked at it, obviously, we can't tell. But we now know that in fact Dueno was saying—I want to find this language.

They're saying the charging papers simply use the boilerplate, which is what we have here, and there are no jury instructions, all that we have here.

"We have found it appropriate"—and I'm sorry, this goes back to Stark II, unfortunately, in the early one.

THE COURT: No, I don't see anything—okay.

MS. PELLEGRINI: "Appropriate for the sentencing court to look at the conduct in effect for which the defendant was charged or pled guilty, because that conduct may indicate that the defendant and the government both believe that the generically violent crime rather than the generically nonviolent crime was at issue."

Well, I'm saying that based upon this record there is no way that a reasonable jurist would find that a generically nonviolent crime was at issue.

THE COURT: I mean, the general concern here is that things happen in state court that have no significance or limited significance at the time that they happened. And then we come here and we put enormous significance on them. So that nothing was litigated in the state court on these [20] issues, and yet now ten years hinge on what was not litigated.

I understand your argument. Thank you.

MS. PELLEGRINI: Thank you, your Honor.

THE COURT: Counsel?

MS. THOMPSON: Would you like for me to address the government's arguments, Judge?

THE COURT: Yes.

MS. THOMPSON: I have to say that I find Dueno slightly oblique in its approach. I also notice that it reversed Judge Gorton's determination to impose an enhanced sentence. And, in doing so, the Court says, "Although the issue is a close one, we do agree with Dueno that on the present record a reasonable jurist could conclude that there is insufficient reliable evidence."

Thus, a reasonable jurist, and I'm assuming that Judge Gorton is one, didn't conclude there was insufficient reliable evidence on the record that they had.

So, while they say that that's possible and reverse, the fact of the matter is that they are reversing a reasonable jurist who did make that conclusion. So I think that that suggests that this is not a conclusion to be drawn lightly.

One of the cases that was relied upon—that the defense has relied upon is the Martinez-Cortez case that [21] comes out of the Fifth Circuit. And it talked about the limitations that Taylor places upon the Court's ability to look or peek beneath the coverlet, or whatever.

That is not Taylor's language. Taylor looks at things that clearly are not specific to the facts of the case being tried, but are specific to the offense being tried, like jury instructions that are given. And that's specific to the offense that the jury returns a verdict on and not specific to the facts of that case, the jury being the fact-finder. But the jury instructions not being factually oriented.

I think that a look at the police report to determine whether it's a dwelling, whether it's a commercial building, whether it's a vehicle, whether it's a vessel is inappropriate under Taylor and under Martinez-Cortez.

And one of the things that has developed in this circuit, right up to Damon, is the use of a factual recitation in a PSR without objection.

And I want to make it clear to the Court that it was my intention to object both to the PSR being relied upon, any factual recitations beyond the face of a complaint, a charging document, and to the government's offering to the Court documents that are not the charging document itself, or the certified copy of the statute.

The way I see Taylor's requirement is that the [22] Court looks at the certified copy of the statute—in this case 266, 16 and 18—and a determination is made. It's a generic burglary, in the case of Taylor, described in the statute. If it is, inquiry ends. All right?

THE COURT: On page 602 of Taylor the Court says, "We think the only plausible interpretation of 924(e)(2)(B)(2) is that, like the rest of the enhancement statute, it generally requires the trial court look only to the fact of conviction"—that's easy—"and the statutory definition of the prior offense," which in this case doesn't get us very far—

MS. THOMPSON: It doesn't—

THE COURT:—"This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction"—and this is the language that I'm focusing on—"in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."

And that's where the Dueno court got the language concerning jury instructions.

So that if this is the framework, I'd look only to the offense of conviction, or maybe a day will come when colloquies in the state court will be attached and we will have exactly what the person admitted to. And that's the other part of the language here—"The person has been [23] convicted by either a trier of fact or by his own admission."

But, absent that, I'm troubled to enhance ten years on this record.

[26] MS. PELLEGRINI: * * *

So, I do think that despite the very narrow language of Taylor that the First Circuit has had, there are situations, such as presented here, where we don't have jury instructions because we didn't have a jury trial, because we have a plea, where the Court may make this inquiry.

Further, the thing about the police report is—I know I keep harping on it, but when a Court says we don't even have it, and then when it goes on at a point, indicates that Damon's—excuse me, Dueno's assertion that the presentence report took its account from a police report that was not even part of the state court file.

To me, when you say those are negative things, if you present the positive, if you have something that is part of the state court file, and you have the police report, and then you have the report saying you're allowed to look at this information to make this determination, then we can look [27] at this and it becomes part of the Court's determination of what

happened in the state court. That sort of archeological dig is still permitted, and the First Circuit has never back-tracked from that.

THE COURT: Although, arguably, you can do that in a situation where the presentence report was not objected to.

In other words, you're not doing much of a dig. You're not—in fact, where the presentence report was not objected to, then you're doing what the last sentence of Dueno suggests, which is "a crime of which he has been convicted either by a trier of fact or by his own admission."

MS. PELLEGRINI: Uh-huh.

THE COURT: And there you have an admitted to characterization of the facts.

MS. PELLEGRINI: Is the Court saying, then, that the only way that we'd be able do this is we'd get a transcript of the plea colloquy?

THE COURT: I'm not sure.

MS. PELLEGRINI: I mean, what if the lower court's determination was how do you plead to 266, 16, and there is no further determination, because the state court's not looking at the same things we're looking at?

THE COURT: No, but I think that that's a [28] troubling issue. I mean, in other words, it's exactly what I said before, which is all sorts of things are being done in state Court that are not—that are done there because they have no significance to the outcome. Then people come over here and suddenly major significance attaches to facts that were not litigated in the state court. And that should give all of us pause. That just should give all of us pause. And I think that this line of cases reflects that.

Now, if we wind up doing this, in other words, taking this narrow view, then maybe it would put pressure on the state

court to be more precise about what it is sentencing and to have a colloquy and have maybe the docket reflect the defendant pled guilty to, and have the facts alleged in the docket, outlined in the docket.

I'm not sure. But the problem is that whatever the prior paragraph is that you read from, it says the sentence can reflect only those parts upon which he has been convicted either by a trier of fact or by his own admission. I don't see where I can go from there.

If you want an opportunity to reconsider the upward departure, I'll give you more time. We can then continue this until next week, and then that's it.

MS. PELLEGRINI: I do want an opportunity to do that, your Honor.

THE COURT: I appreciate the position you're in. [29] Mr. Shepard's record is about as bad as they come. This is, you know—escalating offenses, jail hasn't mattered, institutionalization hasn't mattered, and 30 to 37 months is a relatively modest amount for this kind of record. On the other hand, 15 years is extraordinary.

So, if you want to look at that again, I'll be happy to hear what you have to say and give you an opportunity to respond.

MS. PELLEGRINI: I would appreciate that time, your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

vs.

REGINALD SHEPARD

Boston, Massachusetts
July 14, 1999

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER,
U.S. DISTRICT JUDGE

APPEARANCES:

For the Government: NADINE PELLEGRINI
Assistant United States Attorney
District of Massachusetts

For the Defendant: LINDA J. THOMPSON, ESQ.
Jacobson & Thompson, P.C.
1331 Main Street
Springfield, MA 01103

U.S. Court Reporter: HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * *

[7] Mr. Shepard has no prior involvement with firearms and no subsequent involvement with firearms. This was an offense—and I know that you are involved in a lot of cases, Judge. We came into court with—in the winter looking for discovery with regard to the cooperating individual in this case.

THE COURT: Right.

MS. THOMPSON: And the cooperating individual himself was no white knight.

THE COURT: What a surprise.

MS. THOMPSON: I was shocked myself. But this was a person who evidently was not even legally in the United States. He was involved with the ATF on loan, I understand, from the government's disclosures in this case. But he recruited Mr. Shepard to come in for this firearm offense as a way of working off his own obligation to the government. So, at least from my perspective, this becomes an offense that is sort of government-created. That is, this is not a case where the government, from anything I've been able to tell, was involved in an investigation of gun-running activities or illegal sale of firearms, or some other activity involving firearms, and came upon Mr. Shepard and investigated him and found that he was involved in that activity.

Rather, this was a case where the cooperating [8] witness needed to find somebody to get him some credit for his activities. He did find somebody. He found Mr. Shepard. Mr. Shepard has pled guilty to this offense. But there is no activity in his history that involves the use of firearms in any offense. And while his criminal history is extensive, for this kind of an offense and for no prior involvement with firearms whatsoever, I think that's fairly remarkable.

So, I think that it would be appropriate for the Court to look to the high end of the guidelines as calculated by the probation office. But at this point, when I look at how different the structure is for base offense levels in firearms and in other offenses that are covered by the sentencing guidelines, that Mr. Shepard has not fit into any of those—has not had his base offense level raised either by the specific characteristics of the offense, which would involve multiple firearms or use of a firearm. He is simply a prohibited person who has a firearm and who has an extensive criminal record.

And failing to either satisfy the provisions of 924(e) or the provisions of 2K2.1 to raise the base offense level in some way that would raise his guideline range, I think it's appropriate for the Court to stay within the guideline range as calculated by the probation office.

* * *

[22] So I decline to apply the armed career criminal enhancements. At that point I gave the government an opportunity to move for an upward departure, because I quite agree that this is an extraordinary record. And I do care about the fact that others with a category 6 record, all that you need is 13 or more points, and Mr. Shepard has 39 points, and that really suggests to me that if we stayed at a level 6, that like individuals would be treated in an unfair way; that is to say that they'd be alike in the sense that they were all a category 6, but that 6 would cover such a range of records.

The government has suggested in effect, though, [23] through an upward departure, that I de facto accomplish what the armed career criminal statute would have accomplished, which is a very substantial increase to—is it 110 months—110 to 137? Is that where you are?

MS. PELLEGRINI: Actually, it's 100 to 125, your Honor.

THE COURT: 100 to 125. That's ten years.

MS. PELLEGRINI: That's correct.

THE COURT: I just have to do the math. That's ten years. It seems to me—let me start off with sort of a forgotten document, which I actually read, and that is the statute that started all of this.

And the statute that started all of this, the guideline statute says that, "The Court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph two of this subsection, 3553(a)."

"Sufficient but not greater than necessary." I'm 19 supposed to do what I think is going to do the trick, and not anything more than that.

I look at Mr. Shepard's record, and I was just moved by Ms. Thompson's comments that this really is—this is a record —there are no guns in this record. There's no prior history of firearms in this record. This is an addict's record. I quite agree with what Ms. Thompson says.

[24] This is a stupid record.

THE DEFENDANT: Yes, your Honor.

THE COURT: This is a really stupid record. This is an addict's record of somebody who is literally hurtling from place to place, breaking into the first place he sees, breaking into—what was it, a child-care center at one point? I mean, it was a stupid record. There's no other way to describe this.

THE DEFENDANT: I agree, your Honor, exactly.

THE COURT: As a result of that—not venal. Not violent in the way some other records that I've seen are. Not assaultive behavior, although I guess there's some at moments. Just a plain old stupid record, and very much an addict's record.

* * *

[25] THE COURT: Okay.

I'm going to depart two levels upward to a level 4. I'm going to sentence you to 46 months in prison, with the strongest recommendation to the Bureau of Prisons that you be eligible for and participate in the intensive drug treatment program.

I also want you to write to me, Mr. Shepard. I want to hear what's going on. I want to understand whether or not the presentation you just gave to me is coming from the heart or something that needs to be said at sentencing. So I'd like you to write to me.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Attorney: LINDA J. THOMPSON

JUDGMENT IN A CRIMINAL CASE

X The Defendant Pleaded guilty to count(s): 1

Accordingly, the defendant is adjudged guilty of such count(s),which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)	Felon in Possession of a Firearm	10/95	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address

until all fines, restitution, costs and special assessment imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 021-54-8744

Defendant's Date of Birth: 4/21/62

Defendant's Mailing Address: none

Defendant's Residence Address: Wyatt Detention Center
Central Falls, RI

Date of Imposition 7/14/99

/s/ _____
U.S. District Judge
Dated: 8/6/99

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 MONTHS ON COUNT 1.

X The Court makes the following recommendations to the Bureau of Prisons:

1. THAT THE DEFENDANT PARTICIPATE IN AN 500 HOUR COMPREHENSIVE DRUG TREATMENT PROGRAM.

X The defendant is remanded to the custody of the United States Marshal.

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____TO_____

AT_____with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY:_____

Deputy U. S. Marshal

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SPECIAL CONDITIONS OF SUPERVISED RELEASE
(check all that apply)

X The defendant is prohibited from *possessing a firearm* or other dangerous weapon.

_ The defendant is to pay the balance of the *restitution* according to a court ordered repayment schedule.

_ The defendant is to pay the balance of the *fine* according to a court ordered repayment schedule.

_ The defendant is prohibited from *incurring new credit* charges or opening additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

_ The defendant is to provide the probation officer access to any requested *financial information.*

_ The defendant is to serve __ months in *home detention,**(either)* with electronic monitoring and pay a fee of $4.97 for each day under electronic monitoring.

_ The defendant is to reside for a period of __ months in a *community corrections center* and shall observe the rules of that facility.

X The defendant is to participate in a program for *substance abuse* as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

X The defendant is to participate in a *mental health* program as directed by the United States Probation Office.

X The defendant is to participate in a *Certified Batterer's Intervention Program*, as directed by the Probation Office.

__ The defendant is to complete __ hours of community service at an agency approved by the probation officer.

__ The defendant is to meet with the Internal Revenue Service within the first __ days of the period of supervision in order to determine the prior tax liability and is to file tax returns and pay any future taxes due.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the Probation officer..

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (check if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the criminal monetary penalties section of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set farther below) The defendant shall also comply with the additional conditions on the attached page (if indicated below)

X see special conditions page 3.01

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

STATEMENT OF REASONS

X The court adopts the factual findings and guideline Application in the presentence report.

OR

— The court adopts the factual findings and guideline application in the presentence report except: (see attachment if necessary): COURT DEPARTED UPWARD BASED ON ADEQUACY OF CRIMINAL RECORD. 4A1.3

Guideline Range Determined by the Court:

Total Offense Level:	12
Criminal History Category:	VI
Imprisonment Range:	30 to 37 MONTHS
Supervised Release:	2 to 3 YEARS
Fine Range:	$3.000, to $30.000.

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: N/A

N/A Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d)

N/A For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of title 18, restitution is

not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

N/A Partial restitution is ordered for the following reason(s):

— The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

— The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

X The sentence departs from the guideline range

— upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s):

4A1.3 ADEQUACY OF CRIMINAL HISTORY CATEGORY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Filed January 20, 2000]

Crim. No. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,
Defendant.

SENTENCING MEMORANDUM

January 20, 2000 Reginald Shepard ("Shepard") pleaded guilty to one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). At the time of the offense, Shepard had a number of prior state criminal convictions for breaking and entering. The government argued that at least five of these convictions were "violent felonies" within the meaning of the Armed Career Criminal Act ("ACC") because they qualified as "burglaries" under 18 U.S.C. § 924(e)(2). See U.S.S.G. § 4B1.4. Shpard disagreed. The resolution of this dispute was critical: Shepard faced an increase in his sentence of approximately twelve years if I adopted the government's position.[1]

The substantive issue, whether Shepard's breaking and entering convictions constitute "burglaries," raised an even more fundamental one—how far may a court look beyond the language of the indictment to which the defendant pled guilty

[1] Under U.S.S.G. § 4B1.4, Shepard's sentencing range would increase considerably from 30-37 months to 188-235 months.

or of which he was convicted, to determine the character of a defendant's prior convictions.

The Sentencing Guidelines and the ACC attach substantial penalties not merely to the fact of a prior record, but to the nature of that record. Since these extraordinary consequences were never anticipated when the defendant pled guilty or was convicted in state court, they were never adjudicated by a court or jury, much less admitted to by the defendant. A sentencing court has two choices: On the one hand, she can look only to the formalities of the record—the language of the indictment to which the defendant pled, the meaning of the jury verdict as interpreted by the jury instructions—or the facts which the defendant admitted. On the other hand, she can try to evaluate the record post hoc, without the safeguards of a trial, to determine what the offense was "really" about—what the police report says, what the complaint application indicated.

Both the First Circuit and the Supreme Court have chosen the former. It plainly saves judicial resources. It avoids the legal equivalent of an archeological dig into past records. More importantly, it is by far the fairest approach. As a general matter, we, as a society, reject punishing someone based on facts that were never adjudicated, particularly where the defendant had no idea that the facts would have this added resonance. As I describe below, based on the formal record, I concluded that Shepard did not qualify as an Armed Career Criminal.

But concluding that Shepard did not qualify as an Armed Career Criminal did not mean that his substantial record would be ignored. The government also moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (p.s.) based on the

seriousness of Shepard's criminal history.[2] Again, evaluating only the formal record of Shepard's convictions, I found that the number of convictions, their timing, and their nature, all suggest that Shepard's criminal history understated his culpability and the likelihood, of his recidivism. Accordingly, an upward departure was warranted.

Two hearings were held. The first, on July 7, 1999, focused on the ACC issue. The government asked the Court to accept facts taken from police reports and complaint applications as evidence to support its argument that at least five of Shepard's breaking and entering convictions were really burglaries (and thus "violent felonies") for purposes of the ACC enhancement. The second, on July 14, 1999, focused on the upward departure issue. The government urged the Court to consider the number, and "sheer industrious nature," of Shepard's prior convictions in enhancing his sentence. It then sought a sentence which, in effect, would have achieved the same result as an ACC finding.

In its objections to the pre-sentence report, Shepard opposed any factual recitations beyond the face of the complaints and specifically, any reference to police reports and complaint applications.

I departed upward by two levels. I sentenced Shepard to a term of imprisonment of forty-six months, followed by three years of supervised release. Furthermore, I ordered that Shepard participate in a 500 hour Comprehensive Drug Treatment Program, and attend a Batterer's Intervention Program.

[2] Indeed, the government did so at my invitation. After I indicated that I was not inclined to find Shepard an Armed Career Criminal, I invited the government to move for an upward departure, to be argued at a second sentencing hearing.

I. GUIDELINE CALCULATIONS

Base Offense Level:

The base level under U.S.S.G. § 2K2.1(a)(6)(A) is 14.[3]

Acceptance of Responsibility:

Due to Shepard's guilty plea, he is entitled to a 2 level reduction under U.S.S.G. § 3E1.1(a). Minus 2

Upward Departure:

As discussed below, I concluded that an upward departure of two levels to 14 was appropriate. Plus 2

Total Offense Level:

Shepard's total offense level of 14, and a criminal history category of VI, yields a sentencing range of 37-46 months. I sentenced him to the high end, at 46 months, and further, directed that he participate in a 500 hour Comprehensive Drug Treatment Program, and a Batterer's Intervention Program.

II. FACTS

A. Background

Shepard is a 37 year old man who has been involved with the criminal justice system for almost twenty years. As a young man, he witnessed his alcoholic father physically abuse his mother. Although his mother eventually kicked his father out when Shepard was 10 years old, she later became involved with another man who repeated the pattern, physically and emotionally abusing her, as well as Shepard and his sister. At age 16, Shepard finally moved out. He also

[3] U.S.S.G. § 2K2.1(a)(6)(A) provides that the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who, like Shepard, is under indictment for, or has been convicted of a "crime punishable by imprisonment for more than one year." U.S.S.G. § 2K2.1 (App. Nt. 6)

withdrew from school, got a job as a security guard, and significantly, began using drugs.

Shepard's history of abuse, and his continued use of cocaine and marijuana limited his capacity to keep a job, or to maintain positive relationships. In at least three of his relationships, drug use seemed to be what the couple shared most—in a rooming house in Mattapan, a rented apartment in Hyde Park, a Dorchester home. At the same time, perhaps the other side of drug filled days, at least four of the women obtained restraining orders against him.[4]

In 1988, Shepard tried to stop his drug habit by entering a rehabilitation program at Dimock Detoxification Center. After only six months of staying clean, however, he returned to drug use.

At sentencing, Shepard represented to the Court that he had voluntarily stopped using drugs since 1996. During part of that period, he was in the House of Correction. After his release in 1998, his girlfriend, Kathleen Cole, confirmed that he began attending Alcoholics Anonymous/Narcotics Anonymous ("A.A./N.A.") meetings. Shepard's family, who had largely rejected him because of his drug use, as I describe below, appeared in force at the sentencing hearing to buttress the claim that he had finally addressed his problem.

[4] One of these orders was related to incidents involving Kathleen Cole, Shepard's present girlfriend. In May 1998, Shepard was arrested for, among other things, assault and battery of Kathleen Cole. According to a police report, Ms. Cole reported various acts of physical abuse from a man currently living in her house. This report lead to Shepard's arrest, but these charges were eventually dropped. Ms. Cole states that Shepard was not the man in her report.

B. Criminal History

Since 1980, when he was 18 years old, Shepard has been on an 18-year crime spree.[5] But while lengthy, it is also the criminal history of a drug addict—a series of opportunistic, seemingly unplanned crimes, involving inappropriate targets with little chance of success. He is immediately apprehended; he pleads guilty and as soon as he is released, starts again.

1. The Breaking and Entering Convictions

Of particular importance to this case are Shepard's eleven convictions for breaking and entering,[6] at least five of which the government argues constitute burglaries. Probation and

[5] The longest continuous sentence Shepard received in the House of Correction was for two years in July 1991, for Breaking and Entering in the Daytime.

The convictions during this 18 year time period include charges filed on 5/23/80 (threatening); 11/4/80 (trespassing); 2/9/81 (breaking and entering and larceny); 7/20/81 (possession Class D); 11/15/84 (assault and battery on a police officer); 6/19/85 (operating to endanger and larceny of a motor vehicle); 3/8/87 (shoplifting and trespassing); 10/13/87 (automobile offenses); 5/27/88 (automobile offenses); 11/2/88 (shoplifting); 11/21/88 (shoplifting and trespassing); 12/7/88 (shoplifting and trespassing); 3/2/89 (shoplifting); 4/18/89 (breaking and entering); 5/9/89 (threatening and possession Class B); 5/18/89 (breaking and entering); 5/23/89 (breaking and entering); 7/12/89 (breaking and entering); 7/17/89 (trespassing); 7/27/89 (trespassing); 10/11/90 (breaking and entering and possession of burglarious tools); 3/11/91 (breaking and entering); 7/18/91 (breaking and entering); 1/25/93 (threatening, trespassing, and larceny); 7/9/93 (threatening and shoplifting); 2/4/94 (malicious destruction of property and breaking and entering); 5/23/94 (knowingly receiving stolen property and threatening); 11/9/95 (breaking and entering and larceny); 2/29/96 (breaking and entering and possession of burglarious tools); 5/4/98 (threatening and malicious destruction of property); and 5/12/98 (assault and battery).

[6] It is noted that one of these convictions—February 9, 1981—was not scored for purposes of the Criminal History computation under U.S.S.G. § 4A1.2(e) (out of applicable time period).

the defense disagreed, relying only on the language in the charging documents, the criminal complaints.[7] These complaints recite the boiler-plate language of the statutes, G.L. ch. 266 §§ 16, 18. And that language covers both breaking and entering into a commercial structure or dwelling, which is "generic burglary," as I describe below, and breaking and entering into a vehicle or vessel, which is not.[8]

In an effort to prove the actual conduct involved, in particular the location of the crime (i.e. in a structure or a vehicle), the government supplied additional materials, such as complaint applications and police reports. While the Probation Department described the content of these materials in its amended Pre-Sentence Report ("PSR"), it did not alter its conclusion. It continued to maintain that it was bound to rely only on the formalities of the charges.

In each case, Shepard pleaded guilty to the generally worded complaint. Nothing suggested that the facts alleged in

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[7] As these criminal cases were brought in Massachusetts District Court, Shepard was charged by Complaint, rather than by Indictment.

[8] The relevant statutes provide:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a jail or house of correction for not more than two and one-half years.

Mass. Gen. L. ch. 266 § 16 (1990). Statute was amended in September 1995 to include "or vehicle" language.

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. ch. 266 § 18 (1990). Statute was amended in November 1989, to include "or motor vehicle" language.

the complaint applications or the police reports were ever litigated, much less determined by a court or jury. At no point—then or now, during the various plea colloquies, or at this sentencing—did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaints.

a. April 18, 1989[9]

Shepard was sentenced to 18 months in the House of Correction, 6 months committed, and the balance suspended. The complaint stated that on April 2, 1989, the defendant "did break and enter in the daytime, the building, ship or vessel of Crispus Attucks Children's Center with the intent to commit a felony therein in violation of G.L. c. 266, § 18." The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

b. May 23, 1989

The second conviction resulted in a 2 years suspended sentence and probation. On July 31, 1991, Shepard was found in violation of probation and committed to the House of Correction to serve his sentence. The complaint stated that on May 6, 1989, "the defendant did break and enter in the night time the building, ship, vessel, or vehicle, the property of Jerri Cothran, with intent to commit a felony therein, in violation of G.L. c. 266 § 16."

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[9] Although the government's brief states that this crime occurred on May 8, 1989, the facts described suggest that it intended to discuss the event which passed on April 2, 1989.

In discussing this offense, the government relies on the PSR, and does not supply any additional documentation.

The complaint application and the Boston Police report implied that a home was involved. They alleged that Shepard gained entry by breaking down a cellar door, and was then observed inside the pantry by the owner of the house.

c. March 29, 1991

For this conviction, Shepard was committed to the House of Correction for one year. The complaint stated that on March 11, 1991, "the defendant did break and enter in the night time, the building, ship, vessel or vehicle the property of Fretters, with intent to commit a felony therein in violation of G.L. ch. 266 § 16."

The Watertown Police report suggested that the site was a commercial building. The report stated that two managers of Fretters were in the stockroom when they observed the back door open and Shepard enter. According to both employees, the door was locked, and they believed that to enter, Shepard used a key that he did not return to the store following his termination from employment there several weeks before.

d. July 18, 1991

On this conviction Shepard was sentenced to two years in the House of Correction. The complaint stated that on July 18, 1991, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with the intent to commit a felony therein, in violation of G.L. ch. 266 § 16."

The Boston Police report alleged that the officers responded to a radio call about a suspect in the hallway of a particular apartment building in Dorchester. Upon arrival, the officers observed Shepard walking away from the area carrying items from a particular apartment. Officers found that a panel on the third floor, front door had been broken, exposing the inside door lock.

e. February 4, 1994

The final conviction resulted in a two year sentence, six months committed and the balance suspended. The complaint set forth that on February 3, 1994, "the defendant did break and enter in the day time the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein, in violation of G.L. ch 266 § 18."

The police report stated that Shepard was observed attempting to gain entry into the stated address by turning several doorknobs. A police officer went to the rear of the property and observed Shepard, with both hands through the glass partition, attempting to gain entry through another door. Upon seeing the police officer, Shepard fled, but was soon apprehended and placed under arrest.

2. The Remainder of Shepard's Record

Until the incident leading to the instant plea to Felon in Possession of a Firearm, Shepard was never charged with, or convicted of any crime involving the use or possession of a weapon. No weapon appears to have been involved in any of his prior offenses. Indeed, the vast majority of his offenses are within the jurisdiction of the state district court, for trespass, larceny, receiving stolen property, shoplifting, as well as breaking and entering.

C. This Incident

On October 17, 1995, an Alcohol, Tobacco and Firearms ("ATF") agent, acting in an undercover capacity, met Shepard regarding a prearranged deal to sell firearms. During the meeting, which was recorded on tape, Shepard completed a hand-to-hand sale of a Glock 17, 9 mm pistol for $ 600.00, and various rounds of ammunition for an additional $ 20.00. On March 3, 1999, Shepard entered a plea of guilty to one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g).

Defense counsel maintained that the deal was set up by an informant who needed to make deals to minimize his own sentence. Shepard, she suggested, because of his drug use, was vulnerable. It is clear that Shepard had not been targeted prior to this transaction. He simply fell into the net.

D. Other Facts

At the sentencing hearing, Shepard claimed that he had begun to "turn his life around." Influential in this change was a woman, Kathleen Cole, whom he met in 1996 while he was at Plymouth House of Correction. Cole is a certified Charge Nurse at Sunrise Care in Randolph, MA, and a certified physical trainer. During the period between March 1998 and September 1998 while he was out of jail, Shepard lived with Cole, managed to secure employment, attend A.A./N.A. programs and began counseling.[10] Since his detention at Wyatt on these charges, Cole moved to an apartment nearby. She visits him as often as is permitted and the couple writes to one another daily.

Finally, Shepard remarked on how his personal changes were also influenced by his rekindled relationship with his family, after many years of conflict because of his drug abuse. Indeed, he represented that in his lengthy criminal history not once had his family ever attended a court hearing. During the sentencing hearing on these charges, however, his Godmother, his sister, his niece, his sponsor at N.A., and his girlfriend were present.

III. LEGAL ANALYSIS

A. Armed Career Criminal

The government maintained that Shepard was subject to an enhanced sentence under the provisions of 18 U.S.C.

[10] He reported that instead of medicating himself with illegal drugs to deal with anger and depression, he took prescribed medications, which appear to be working.

§ 924(e). Specifically, it contended that Shepard qualified as an Armed Career Criminal pursuant to U.S.S.G. § 4B1.4(a). Under this provision, Shepard's base offense level would increase to 33, from 14. See U.S.S.G. § 4B1.4(b)(3)(B).

Pursuant to U.S.S.G. § 4B1.4 and 18 U.S.C. § 924(e), a defendant is determined to be an Armed Career Criminal if the following conditions exist: (1) the instant offense of conviction is a violation of 18 U.S.C. § 922(g), and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another. See U.S.S.G. § 4B1.4 (App. Nts).

The term "violent felony," as set forth in 18 U.S.C. § 924(e)(2), provides:

> The term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use of, carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise, involves conduct that presents a serious potential risk of physical injury to another.[11]

In *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), the Supreme Court considered whether the defendant's predicate offenses qualified as "burglary" as defined in 18 U.S.C. § 924(e). Not content to rely on how each state might define "burglary," the Court defined generic "burglary" as the "unlawful and unprivileged entry into or remaining in, a building or structure, with intent

[11] The government relied only on the argument that Shepard's prior convictions constituted "burglaries" under 18 U.S.C. § 924(e)(12).

to commit a crime." See 495 U.S. at 599. In order to determine whether the defendant was convicted of such an offense, the Court held that a sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This, it dubbed, was the "categorical" approach (which I have described as focusing on the formalities of the record). See Taylor, 495 U.S. at 600; *United States v. Damon*, 127 F.3d 139, 141, 142 (1st Cir. 1997).[12]

To be sure, the Taylor court noted there was a problem when a single state statute swept beyond the elements of generic burglary, including within it breaking and entering in places other than buildings or structures (namely vehicles or vessels), and where the defendant's plea tracks the statute. See 495 U.S. at 599; *Damon*, 127 F.3d at 142. In such a case, while the sentencing judge may not hold a mini-trial on the particular facts underlying the prior offense, see *United States v. Dueno*, 171 F.3d 3, 4 (1st Cir. 1999) (citing *Damon*, 127 F.3d at 144; *Meader*, 118 F.3d at 882) he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a violent or a non-violent crime. See *Dueno*, 171 F.3d at 4 (citing *Winter*, 22 F.3d at 18). The question raised is how far that "peek" can go.

Not very far, is the answer; the exception to the categorical approach is a limited one. See *Taylor* 495 U.S. at 600-602; Damon, 127 F.3d at 142-46. The Court may consult "undisputed" and "accurate, judicially noticeable sources" for further guidance. See *Damon* 127 F.3d at 145, 147. If the defendant was convicted after a trial, the court is permitted to

[12] Following Taylor, the First Circuit's analysis of predicate offenses has generally utilized this "categorical" approach. See e.g., Damon, 127 F.3d at 142 (citing *United States v. Meader*, 118 F.3d 876, 881-83 (1st Cir. 1997); *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994); *United States v. De Jesus*, 984 F.2d 21, 23 (1st Cir. 1993)).

consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. See Damon, 127 F.3d at 142; *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (a court may consider the guilty plea when no jury instructions are available). Finally, if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant. See *Dueno*, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.

In this case, the breaking and entering statute under which Shepard pled guilty is the hybrid kind, covering conduct which constitutes "generic burglary," and conduct which does not.[13] See Taylor, 495 U.S. at 598; *Dueno*, 171 F.3d at 5 (refusing to find that all conduct described by Mass. Gen. L. ch. 266 § 16 is violent); cf. *Harris*, 964 F.2d at 1236 (assuming in dicta that breaking into and entering a vehicle is not a violent felony under the ACC). Each complaint does no more than mirror the statutory language. As a result, the government urges this Court to "peek" further to ascertain whether Shepard's crimes can be categorized as burglaries. The complaint applications and police reports, the government argued, suggested that the offenses involved breaking and entering into a "building" on all five occasions. Shepard objected, claiming that this was the very "archaeological dig" that the Supreme Court rejected.

I agreed with Shepard. Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See *Dueno*, 171

[13] For statutory language, see supra note 8.

F.3d at 6 (noting that the government provided no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found therein. See *Harris*, 964 F.2d at 1236-37.

In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts—the location of the breaking and entering—were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in the state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent.[14]

[14] In Damon, the First Circuit articulated five important policy considerations supporting the categorical analysis. See 127 F.3d at 145-146. First, Congress intended the Guidelines themselves to take on a categorical approach to sentencing. Following such an approach leads to like cases receiving like sentences. *See id.* at 145. Second, using a categorical approach makes sense administratively as it only requires the court to look to readily available sources of undisputed information. Alternatively, a minitrial on the facts would impose "an onerous burden, freighted with unusual evidentiary difficulties," which are time consuming and could be unfair. *Id.* at 146 (citing Taylor). Third, the court found that the categorical approach honors the choice of the state in its decisions concerning which crimes to prosecute and how plea bargains should be negotiated. Fourth, the categorical approach is more or less evenhanded. On the one hand, in cases like this one, the approach may lead to lesser sentences than would result if the actual conduct could be considered. On the other hand, the approach may lead to higher sentences in other cases where a certain crime is categorically considered a "violent felony" even if the actual conduct exhibited no such violence. *See id.* Finally, the Court emphasized that this is a sentencing enhancement. The defendant has already been punished once for his earlier offenses. The fact that the Court is not permitted to consider the underlying conduct does not mean that the defendant somehow escapes punishment altogether. *See id.*

See *Taylor*, 495 U.S. at 600-602 (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno*, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admissions").[15]

[15] I have raised like concerns before, in *United States v. Footman*, 66 F. Supp. 2d 83, In Footman I addressed the language in the Guidelines which appeared to permit a court to look at prior criminal conduct in evaluating criminal history, and not merely prior criminal convictions. U.S.S.G. § 4A1.3(e) permits the court to consider "prior similar adult criminal conduct not resulting in a criminal conviction," so long as the information is "reliable." U.S.S.G. § 4A1.3 (Background). This section refers only to an upward departure because of the adequacy of criminal history, which is a discretionary judgment on the part of the judge. It does not refer to the Armed Career Criminal provisions of U.S.S.G. § 4B1.4 where the consequences of a finding of a prior violent felony are automatic and draconian. Second, in Footman, I added that just because a judge is permitted to consider this information does not mean he or she should do so:

> Once one ventures past formal convictions, and formal sentences, one is in troubling territory. How can the court reconstruct prosecutions long past? Should the court essentially retry the past conduct, or rely on police reports which may well be skewed? And if a matter has been dismissed, or worse, resulted in an acquittal, how can the court, many years hence, substitute its judgment for that of the original decision-maker?

Footman, supra 66 F. Supp. 2d at 100.

The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty. Accordingly, I found insufficient evidence to conclude that Shepard's three of the five guilty pleas constituted crimes of generic burglary. See U.S.S.G. § 4B1.4; 18 U.S.C. § 924(e). As such, the Armed Career Criminal enhancement did not apply.

B. Inadequate Criminal History Category

The government argued that an upward departure is warranted and recommended a departure of twelve levels to an offense level of 24. Two questions were raised—the fact of an upward departure and the amount.

1. Whether an Upward Departure is Warranted

The Commission, pursuant to its authority under the Sentencing Reform Act, determined that a defendant's "past criminal conduct"[16] is directly relevant to the purposes of sentencing: An individual "with a record of criminal behavior" is more culipable than a first offender. Moreover, "General deterrence" requires that a message be sent that "repeated criminal behavior" will aggravate the punishment.[17] Finally, the commission suggests a criminal record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other.[18]

U.S.S.G. § 4A1.1 attempts to identify the factors which correlate with these characteristics. For the most part, the criminal history score is keyed to the length of the sentence that the individual received in state court.[19] Presumably, the

[16] U.S.S.G. Ch. 4, Intro. Comment.

[17] *Id.*

[18] *Id.*

[19] In addition, the score is increased if the offense was committed while on supervision, or shortly after being released from prison. See U.S.S.G. § 4(A)1.1 (d)(e).

longer the sentence, the more serious the underlying conduct must have been. Category VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

There are serious limitations with the approach which the Guidelines recognize. Policy statement U.S.S.G. § 4A1.3 (p.s.) suggests that for an egregious criminal record, the top guideline range, Criminal History Category VI, may not always be adequate to reflect the seriousness of the defendant's criminal history. See U.S.S.G. § 4A1. 3 (p.s.) Moreover, because of the way convictions are scored, an individual with five prior sentences for very large scale fraud, may have the same number of criminal history points (because of the time he or she received for each), as another who had ten small offenses for which he or she received lesser sentences per case. The former would have a far more serious criminal record, warranting an upward departure. *See id.*

The government called for an upward departure on a number of grounds. It relied on the same argument as it did in insisting on ACC status, namely that some of Shepard's breaking and entering convictions in reality comprise burglaries which were "violent felonies." But as noted above, I did not make that finding.

Second, the government looks to the sheer number of convictions and the general nature of his criminal habits to support an increase.

The general methodology, which I outlined in *United States v. Footman, supra* (upward departure) on the one hand, and *United States v. Leviner*, 31 F. Supp. 2d 23 (D.Mass. 1999) (down ward departure) on the other, is as follows:

> . . . What is it about the [criminal history] score which created the under (or over) valuation of the record?: (i) prior sentences not counted in computing criminal

history (e.g., foreign sentences), (ii) prior sentences of "substantially more than one year" that derive from independent crimes on different occasions, see § 4A1.3(a) and (b); (iii) the timing of convictions—did they follow closely one after another, or while another charge was pending, see U.S.S.G. § 4A1.3 (d); and (iv) the nature of the convictions,—e.g., assaultive behavior or non-violent conduct.

Leviner, 31 F. Supp. 2d at 32-33.

Here, categories (iii) and (iv) as described in Leviner, are significant. Shepard's criminal history score is 39, three times the number triggering Category VI. Moreover, the timing of the convictions bespeaks someone who is out of control - committing one crime after another while on supervision, shortly after being released.

Shepard, however, emphasizes the nature of the convictions. He has never been charged with offenses that might have warranted a Superior Court indictment as opposed to a complaint in District Court. None of his prior offenses involved firearms; most are shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering.

But while the offenses did not involve firearms per se, and may not formally be "violent crimes" or "burglaries" under U.S.S.G. § 4B1.4, the record, however characterized, still suggests the likelihood of recidivism. One does not have to "peek beneath the coverlet" to conclude this.

2. Extent of Departure

a. Degree of Departure

In calculating the appropriate offense level when the Criminal History Category is already VI, the Guidelines instruct the Court to depart by moving incrementally down

the sentencing table to the next higher offense level until it finds the range appropriate for the case. See U.S.S.G. § 4A1.3 (p.s.).

In determining "appropriateness," I am guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs me to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth. . ." 18 U.S.C. § 3553(a).

While Shepard's record suggests recidivism, it also suggests an out of control drug addict. Shepard gets out of jail, and returns to drugs, and the crimes he must commit in order to afford the drugs. Whatever sentence I impose must also include serious attention to Shepard's addiction. I have been told by the Probation Department that a sentence in the Guideline range of 30-37 months would not qualify Shepard for participation in the intense drug treatment program of the Bureau of Prisons.[20] Only a sentence at 46 months or more would suffice.

Shepard has never before served a federal sentence in a prison far from home. He has never served more than 2.5 years, and never in any institution other than the House of Correction. A departure to offense level 14, a Guideline range of 37-46, and a sentence at the high end, would be "sufficient," but not "greater than necessary" to meet all purposes of the Sentencing Reform Act.[21]

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[20] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pretrial detention, will not suffice.

[21] The purposes set forth in 18 U.S.C. § 3553(a)(2) are:

(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;

(B) to afford adequate alternative to criminal conduct;

As such, I sentenced Shepard as follows:

I departed up two levels, to an offense level of 14. The Guideline range for this level at Criminal History Category VI is 37-46 months. I sentenced Shepard to 46 months in prison, with three years supervised release. In addition, I recommended that Shepard participated in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to me of his progress.

SO ORDERED.

Dated: January 20, 2000

NANCY GERTNER, U.S.D.J.

(C) to protect the public from further crimes of the defendant, and;

(D) to provide the defendant with needed educational or vocational training, medical care or other corrective treatment in the most effective manner.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2167

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

November 13, 2000, Decided

JUDGES: Before Torruella, *Chief Judge*, Lipez, *Circuit Judge* and Keeton,* *District Judge*.

OPINIONBY: LIPEZ

OPINION:

LIPEZ, Circuit Judge. This case requires us to decide the following question: may a sentencing court consider certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior "violent felonies" qualifying for sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). This question arises because the Massachusetts breaking and entering statute encompasses unlawful entries into buildings, vehicles, or vessels. For purposes of the ACCA, however, breaking and entering into a building qualifies as a violent felony, while breaking and entering into a vehicle or vessel does not.

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* Of the District of Massachusetts, sitting by designation.

On at least five prior occasions, Reginald Shepard had pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The government submitted police reports and complaint applications to the district court to show that Reginald Shepard had pled guilty to breaking and entering buildings on these five prior occasions. At sentencing, the district court concluded that the Supreme Court decision in *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), and our own precedents applying Taylor, prohibited consideration of the complaint applications and police reports. In the view of the district court, such consideration would be inconsistent with the categorical approach to the analysis of predicate offenses announced in Taylor because police reports and complaint applications "contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard." We disagree with the court's reading of Taylor and our precedents. We vacate the district court's ruling and remand for resentencing.

I.

On October 17, 1995, Reginald Shepard sold firearms to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. During the taped meeting, Shepard sold a Glock 17, 9mm pistol for $ 600 and ammunition for $ 20.00. On March 3, 1999, Shepard entered a guilty plea to one count of felon in possession of a firearm, 18 U.S.C. § 922(g)(1). The ACCA mandates a fifteen-year minimum penalty for a person convicted as a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g) who has three prior convictions for a violent felony or serious drug offense. See 18 U.S.C. § 924(e)(1). The government claimed that five of Shepard's eleven prior convictions were burglaries of buildings, a category of violent felony under the ACCA.

The complaints charging Shepard with breaking and entering recited the language of Chapter 266, sections 16 and 18, of the Massachusetts General Laws which define the offense to include unauthorized entry into vehicles or vessels, as well as buildings.[1] For example, a complaint from May 1989 states that Shepard "did break and enter in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein."

In *Taylor v. United States*, 495 U.S. 575, 598, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), the Supreme Court adopted a "generic" definition of burglary for purposes of ACCA enhancement that limits the crime to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." To show that Shepard's breaking and entering convictions involved buildings rather than vehicles or vessels, the Government offered certified copies of complaint applications and police

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[1] Section 16 provides:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.

MASS. GEN. LAWS ch. 266, § 16. Section 18 provides:

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

MASS. GEN. LAWS ch. 266, § 18.

reports obtained from the state court files.[2] These documents contain the following accounts of the five offenses at issue.

May 1989: The Boston police report states:

> Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night;" that the place of offense was "30 Harlem St.," and that the property stolen or destroyed was a "cellar door."

March 1991: The Watertown police report states:

> In reference to . . . a B&E&L from the FRETTERS store # 550 Arsenal Street Town reported on 3-11-91 the following is submitted:
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> A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal Shepard of # 9 Weaver Way Roxbury, enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot toward arsenal street.

[2] By certifying a document, the signer attests that it has been accurately copied, not that the facts in it have been verified. The certifications of the police reports and complaint applications signed by the clerk or magistrate in this case state: "I hereby certify that this is a true copy, given under my hand and seal this 6 day of May 1999."

> NOTE* According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession. . . .
>
> After this incident took place both [managers] did a quick inventory of the backroom area and found that (4) Emerson VCRs (20) 13" Hitachi T.V.s and (1) 19" Toshiba T.V. were missing.[3]

July 1991: The Boston police report states:

> Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell St.
>
> Upon arrival observed S/P (described above) walking away from above address. S/P carrying a pink pillowcase. Officers detained S/P to conduct thresholdinq., found pillowcase to contain property listed above. . . . Officers checked bldg and found a panel on 3rd floor front door had been broken in exposing inside door lock. Officers entered apt. and observed, in living room, areas where V.C.R. and phone were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow. Sheets and pillowcases in bedroom were all pink in color.

Consistent with the police report, the complaint application states that the defendant is charged with "b/e daytime," that the place of offense is "258 Norwell St." and that the property stolen or destroyed was a "V.C.R" and "phone/ans. machine."

February 1994: The Watertown police report states:

> Responded to a R/C [radio call] for a black male going door to door asking for an unk. person. . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by

[3] The record does not include a complaint application.

> turning several door knobs . . . Officer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement).

The complaint application states that the defendant was charged with "1. breaking & entering 2. wilful malicious destruction of personal property," that the place of offense was "145 Gallivan Blvd.," and that the property stolen or destroyed was a "rear door."

April 1989: According to the district court:[4]

> The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

The Probation Department included in the Pre-Sentence Report (PSR) descriptions of the police reports and complaint applications. The department concluded, however, that the court could not sentence Shepard as an armed career criminal because it could not use those documents to determine whether Shepard had pled guilty to a violent felony. Shepard agreed with the department's conclusion, but he objected to the inclusion in the PSR of factual allegations other than those set forth in the complaints to which he had pled guilty in state court. The government also filed an objection with the court challenging the Probation Department's failure to apply the ACCA enhancement.

At the conclusion of a two-part sentencing hearing, the court rejected the government's request for an enhancement

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[4] We quote from the district court's rendering of the complaint application because we do not have the application in the record before us. The district court notes that the government did "not provide any additional documentation."

under the ACCA, which would have placed Shepard's sentencing range at 188-235 months. Instead, the court sentenced Shepard pursuant to the "prohibited person" provision, HN4 U.S.S.G. § 2K2.1(a)(6)(A), which prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a "crime punishable by imprisonment for more than one year," U.S.S.G. § 2K2.1, comment. (n.5). The court also granted the government's motion for an upward departure pursuant to U.S.S.G. § 4A1.3 due to the seriousness of Shepard's criminal history and increased his sentencing range from 30-37 months to 37-46 months. We quote at length the district court's lucid rationale for its decision:

> Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. *See [United States v.] Dueno*, 171 F.3d [3] at 6 (noting the government provided no documents which had been before the judge when the plea was accepted).
>
> No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found within. *See [United States v.] Harris*, 964 F.2d [1234] at 1236-37.
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> In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts—the location of the breaking and entering—were not necessary to his state plea. It is only now, years later, that they seem

central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. *See Taylor*, 495 U.S. at 600-602 (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); Dueno, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission").

The government brought this appeal, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing Shepard as an armed career criminal. The question of "whether a conviction for a particular type of crime qualifies as a predicate offense [under the Armed Career Criminals Act] presents a purely legal question, sparking de novo review." *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994).

II.

A. The Taylor Categorical Approach

The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision (§ 922(g)) and has three prior convictions "for a violent felony or serious drug offense, or both, committed on occasions different from one another" will receive a fifteen-

year minimum sentence.[5] 18 U.S.C. § 924(e)(1). The statute defines a violent felony as:

> Any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

In *Taylor v. United States*, 495 U.S. at 596-600, the Supreme Court considered whether the defendant's prior burglary convictions qualified for enhancement under § 924 (e) despite the defendant's contention that the convictions did not involve conduct that presented a serious potential risk of physical injury to another. The United States Court of Appeals for the Eighth Circuit had rejected Taylor's argument, ruling that the word burglary in § 924(e)(2) (B)(ii) "means 'burglary' however a state chooses to define it." *United States v. Taylor*, 864 F.2d 625, 627 (1989). The Supreme Court disagreed, concluding that predicate offenses under the ACCA are "crimes having certain common characteristics—the use or threatened use of force, or the risk that force would be used—regardless of how they were labeled by state law." Taylor, 495 U.S. at 589. The Court called this focus on crimes having certain specified elements or common characteristics a "categorical approach," which the Court attributed to Congress. In order to implement the

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[5] When the ACCA applies, the Guidelines address whether, based on the defendant's criminal history and offense level, the fifteen-year minimum or a greater sentence is warranted. U.S.S.G. § 4B1.4 specifies how the court should calculate the defendant's criminal history and base offense level so that it can use the sentencing grid to determine the length of imprisonment beyond the statutory minimum.

categorical approach in Taylor, the Court concluded that Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." *Id.* The court found that definition to be the following: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

Having settled upon the generic definition of burglary intended by Congress in the ACCA, the Court turned to a second question in Taylor: "whether, in the case of a defendant who has been convicted under a nongeneric-burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the Government may seek enhancement on the ground that he actually committed a generic burglary." *Id.* at 599-600. In addressing that question, the Court again invoked the categorical approach intended by Congress. It noted that "the practical difficulties and potential unfairness of a factual approach are daunting," *id.* at 601, and concluded that the categorical approach to the nongeneric burglary statute "requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602.

Then the Court immediately offered a qualification to the rule it had just announced:

> This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government

> should be allowed to use the conviction for enhancement.

Id. This qualification permits a court to consider the charging document and jury instructions and to conclude that the fact of conviction necessarily means conviction of the generic crime of burglary included in the ACCA.[6]

In Taylor, however, the Court did not address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has pled guilty to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA. That is the issue we have addressed in our precedents,[7] and to which we now turn.

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[6] In addition to specific crimes such as burglary, arson, and extortion, the Armed Career Criminal Act defines as a "violent felony" a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We have regarded the Taylor categorical approach for burglary as applying to other kinds of felonies that may qualify as violent under the "otherwise" clause. *See United States v. Sacko*, 178 F.3d 1, 7 (1st Cir. 1999).

[7] To be precise, our precedents address this issue in the context of both the Guidelines' career offender enhancement for crimes of violence and the Armed Career Criminal Act's enhancement for violent felonies. The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *See* U.S.S.G. § 4B1.1. The commentary to U.S.S.G § 4B1.4 states: "It is to be noted that the definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in § 4B1.1 (Career Offender) . . . ." U.S.S.G § 4B1.4, cmt.n.1. Despite the differences between § 4B1.1 and § 924(e)(2), the categorical approach applies to both provisions and we may look to the § 4B1.1 cases to elucidate the nature of the categorical inquiry. *See, e.g., United States v. Meader*, 118 F.3d 876, 882 (1st Cir. 1997) (although Taylor's narrow exception may apply to cases that come under the "otherwise" clause of § 4B1.2, "the standard approach for determining whether a particular crime fits within the 'crime

B. The Categorical Approach and the Guilty Plea

Not surprisingly, our precedents separate into two strands that reflect the two distinct questions addressed by the Supreme Court in Taylor. We will discuss them accordingly.

1. Whether the Applicable State Statute Defines a Violent Felony or a Crime of Violence

As we noted, the Taylor Court first decided what common elements of burglary would make it a violent felony under the ACCA. In *United States v. Damon*, 127 F.3d 139 (1st Cir. 1997) and in *United States v. Sacko*, 178 F.3d 1 (1st Cir. 1999), the comparable question was whether the statutory offenses at issue in those cases constituted a crime of violence within the meaning of the Guidelines (Damon) or a violent felony within the meaning of the ACCA (Sacko). This was a general definitional question that did not depend on documents specific to that case.

In Damon, we considered the district court's use of a PSR to determine whether a Maine conviction for aggravated criminal mischief constituted a "crime of violence." The charging document indicated that Damon was convicted under subsection B of the statute, which applies to a person who intentionally or knowingly damages or destroys property valued at over $ 2,000 in order to collect insurance proceeds. *See Damon*, 127 F.3d at 142-43. Thus, "the inquiry is whether the elements of subsection B fit the definition of a crime of violence under U.S.S.G. § 4B1.2(1)(ii)." *Id.* at 143. We looked to the "mine run of conduct" that the statute was intended to cover and concluded that "the typical conduct reachable under subsection B does not involve a serious

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of violence' rubric is a generic one, in which inquiry is restricted to the statutory definitions of the prior offense, without regard to the particular facts underlying them"); *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994)("Determining whether a previous conviction represents a crime of violence necessitates a formal categorical approach.").

potential risk of physical injury to another." *Id.* at 143-44. We concluded that the district court erred by considering the fact that the defendant set fire to his house to collect insurance proceeds because "under Taylor, when the predicate statutory crime has been determined to be typically non-violent, the inquiry ends." *Id.* at 145.

In Sacko, we concluded that the district court erred by considering the statement in the PSR that the defendant's prior statutory rape conviction involved non-consensual intercourse. That consideration involved the very reliance proscribed by Taylor—reliance on "the facts of Sacko's crime in order to determine whether his conviction was for a violent or a non-violent crime," Sacko, 178 F.3d at 5. We held that under the categorical approach, the proper inquiry was whether the category of the offense, statutory rape of a fourteen year-old, constituted a violent felony. We noted that there was "no legal basis . . . no studies or medical journals" to ground a holding that intercourse with an adult is physically dangerous for a fourteen-year-old female. *Id.* at 6. We remanded the case to the district court to take evidence on this issue.

Both Damon and Sacko posed the definitional question whether the statutory offenses at issue constituted a crime of violence under the career offender guideline (Damon) or a violent felony within the meaning of the ACCA (Sacko).[8]

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[8] Our circuit addressed related definitional questions in two other cases, *United States v. Winter*, 22 F.3d 15 (1st Cir. 1994) and *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999).

In Winter, the issue before the court was whether racketeering, conspiracy to commit racketeering, travel in aid of racketeering, and sports bribery qualified as predicate crimes of violence under the career offender guideline. Because physical force is not an element of any of these offenses, we asked whether, from a categorical standpoint, any of them could be said to pose "serious risk of physical injury," as the guideline required. Following Taylor, we cautioned that "the court should

There was no uncertainty about whether a violent or non-violent offense encompassed within a statute was involved in the fact of conviction. As we noted in Damon, such cases do not "raise the question of what documents beyond the charging document or the jury instructions may be examined to determine which subsection of the multi-faceted crime is involved. The question about what subsection or type of statutory crime is involved is resolved here by the charging document." 127 F.3d at 144 n.5.

2. Whether the Fact of Conviction was for a Violent or Non-Violent Felony When the Applicable State Statute Encompasses Both

The second question addressed in Taylor was whether a conviction under a nongeneric burglary statute, which included violent and nonviolent offenses, could be a conviction for a predicate offense under the ACCA. In *United States v. Harris*, 964 F.2d 1234 (1st Cir. 1992) and *United States v. Dueno*, 171 F.3d 3 (1st Cir. 1999), we addressed a comparable question. There was no definitional uncertainty in those cases about whether a statutory offense constituted a violent crime. Instead, the uncertainty was whether the fact of conviction related to a violent crime or a nonviolent crime. As we recognized, that uncertainty could only be resolved by considering case specific documents.

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not plunge into the details of a particular defendant's conduct," but, rather, "should merely assess the nature and object of the racketeering activity as described in the indictment and fleshed out in the jury instructions." Winter, 22 F.3d at 19.

Meade involved the question of whether the defendant's misdemeanor conviction for spousal assault, under a general assault and battery statute, qualified as a misdemeanor crime of domestic violence. The court construed the underlying statute to determine that the conviction did so qualify, rejecting the defendant's argument that Taylor's categorical approach should extend so far as to prevent courts from establishing the elements of the statute of conviction. *See Meade*, 175 F.3d at 221.

In Harris, the defendant pled guilty to a Massachusetts assault and battery statute which covered both actual or potential physical harm and unharmful but nonconsensual touching. We acknowledged the general rule under Taylor that when the statute encompasses violent and non-violent conduct, the sentencing court should look to the indictment and information or jury instructions to make the violent felony determination. However, we recognized that Harris's case posed a further question: "What . . . should a court do when there are no jury instructions to look at . . . because the defendant pled guilty?" Harris, 964 F.2d at 1235. In answer to that question, we said the sentencing court should:

> look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested . . . in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue.

Id. at 1236.

We concluded in Harris that "the record before us provides adequate information to make the required determination relatively simply." *Id.* In particular, we considered a PSR which recited facts from the case file revealing that both of the defendant's assault and battery convictions involved violent beatings. *Id.* at 1236-37. We found the PSR to be a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR—i.e., that the defendant perpetrated a violent assault—were "uncontested and uncontradicted." *Id.* at 1237. Given the PSR's uncontradicted account of the defendant's conduct, we concluded "that the defendant and the government both believed" that a generically violent crime was the basis for the defendant's guilty pleas. *Id.* at 1236.

In *United States v. Dueno*, 171 F.3d 3, 6-7 (1st Cir. 1999), despite strong urging from the defendant, we refused to retreat from Harris's limited inquiry into conduct "in respect to which the defendant was charged and pled guilty." Dueno, 171 F.3d at 5 (analyzing the Guidelines' career offender enhancement). As here, Dueno involved a predicate Massachusetts breaking and entering conviction memorialized by a judgment which was ambiguous as to whether the defendant broke into or entered a building or a vehicle. *See id.* at 5. On appeal, the government conceded that the district court had engaged in erroneous reasoning in concluding that the conviction was for breaking into and entering a building,[9] but urged us to sustain the enhancement on the ground that Dueno never contradicted the PSR's account of the break-in, which described a building invasion. *See id.* at 6. Although we regarded the issue as "close," we declined to affirm on the government's alternative ground and instead remanded. *Id.* at 7. Applying Harris, we concluded that "on the present record, a reasonable jurist could conclude that there is insufficiently reliable evidence to ground a finding that Dueno pleaded guilty to breaking into and entering a building." *Id.* at 7. Specifically, we noted several problems with the evidence presented to the sentencing court. First, instead of offering the police report from which the facts were taken, the government offered only the PSR which incorporated facts from the police report. Second, the evidence did not include "a single document that was before the judge who accepted

[9] The court had accepted the government's argument that a second charge in the complaint for destruction of property, which alleged harm to "the personal property, dwelling, house or building of [the victim]," established that Dueno broke into and entered a building, and thus committed a crime of violence. On appeal, the government conceded that this description could refer to unlawful entry and vandalism of a vehicle as much as to destruction of property related to breaking and entering into a building. *See Dueno*, 171 F.3d at 5-6.

Dueno's plea." *Id.* at 7. Third, there was no account of what took place at Dueno's plea hearing.

At the conclusion of Dueno, we said the following:

> Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted—either by a trier of fact or by his own admission. As matters now stand, the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report.

Dueno, 171 F.3d at 7 (emphasis added). In its decision in this case, the district court relied on the language we emphasize. Although the court's reliance on this language is understandable, that reliance nevertheless reflects a misapplication of Harris, reaffirmed by the Dueno decision, and of Dueno itself.

C. Consideration of Police Reports and Complaint Applications

Dueno's reference to an admission by the defendant cannot be read apart from the inquiry framed in Harris: looking to the conduct in respect to which the defendant was charged and pled guilty, did "the defendant and the government both believe[] that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue." Harris, 964 F.2d at 1236. In fact, having reaffirmed Harris, Dueno describes the sentencing court's inquiry into the meaning of the defendant's guilty plea in a specific sense that reflects Harris—does the defendant's plea of guilty "constitute an admission" to a crime of violence? *See Dueno*, 171 F.3d at 7 ("the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report") (emphasis added). The court's determination on the violent felony or crime of violence question does not turn on an

explicit admission by the defendant to alleged conduct in the sense of "yes, I struck the victim in the face," either at the time the defendant pled guilty to the earlier offense or when the enhancement issue arises at sentencing for a subsequent offense. Rather, the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. *See United States v. Broce*, 488 U.S. 563, 570, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989) ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.").

Nevertheless, Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime under a statute that encompasses violent and non-violent conduct. In Harris, we allowed the district court to rely on an uncontradicted PSR. In Dueno, where the court had used faulty reasoning in making its crime of violence determination, we declined to rule that the uncontradicted narration of events in the PSR established that Dueno had pled guilty to a crime of violence. Rather, in concluding that the issue reasonably could be decided either way, we pointed out that the government did not offer the police report from which the facts in the PSR were taken, nor any other document that was before the judge who accepted Dueno's plea.

Here, noting the deficiencies cited in Dueno, the government offered certified copies of police reports and complaint applications. Based on our precedents, we see no justification for an absolute bar to the consideration of such documents when the sentencing court must determine whether the defendant and the government both believed that the defendant was entering a guilty plea to a generically

violent crime.[10] Such a bar would make the use of prior convictions based on guilty pleas for purposes of the ACCA or criminal offender guideline enhancement hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony or a crime of violence. Indeed, in Dueno, where we could have easily adopted a bright-line rule barring the use of police reports, we did not. We noted instead the absence in the record of "a copy of the police report in question" or of "an explanation where the police report came from." Dueno, 171 F.3d at 7. These specific deficiencies made the PSR account insufficiently reliable for us to determine as an initial matter and as a matter of law that Dueno pled guilty to breaking and entering into a building.

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[10] Other circuits have not addressed the precise question of whether police reports and complaint applications are reliable evidence for determining whether a defendant has pled guilty to a violent crime when the statute under which he is charged addresses violent and non-violent conduct. Some courts, however, have allowed consideration of documents such as PSRs, plea agreements, and plea transcripts. *See United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997) (district court properly relied on plea transcript to determine whether defendant pled guilty to generic burglary); *United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996) (district court properly considered PSR to determine whether defendant's prior conviction was for generic burglary); *United States v. Hill*, 53 F.3d 1151, 1154 (10th Cir. 1995) (en banc), cert. denied, 516 U.S. 900, 133 L. Ed. 2d 182, 116 S. Ct. 258 (1995) (district court may consider text of guilty plea and/or other documents that, coupled with the charging instrument, enable the court to determine that defendant's prior conviction was for generic burglary); *United States v. Gallman*, 907 F.2d 639, 645 n.7 (7th Cir. 1990), cert. denied, 499 U.S. 908, 113 L. Ed. 2d 219, 111 S. Ct. 1110 (1991) (district court should refer to plea agreement or plea transcript to determine whether defendant's prior conviction was for generic burglary). But *see United States v. Barney*, 955 F.2d 635, 639 (10th Cir. 1992) ("we do not hold . . . that the sentencing court determining enhancement may rely on the presentence report").

The district court in this case did not attempt to evaluate the reliability of the police reports and complaint applications as a basis for the finding contemplated by both Harris and Dueno—whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of breaking and entering a building. In addressing that issue, the court should have asked the kind of questions suggested by our precedents. As discussed in Dueno, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in Harris, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime? We cite these questions from our precedents as illustrative of the kind of inquiry that should be made. They are not offered as an exhaustive list.

The reference above to a defendant's contesting the facts set forth in a police report requires us to address a confusion relating to the concept of an admission when the enhancement issue arises at sentencing. The district court stated that "if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant." *See also Dueno*, 171 F.3d at 7; Harris, 964 F.2d at 1236-37. That statement is accurate. Such admissions would be important for the reasons they were important in Harris:

> These two items of uncontested and uncontradicted information make clear that neither of the two "assault and battery" crimes for which Harris was charged and

> convicted were "nonconsensual touching" crimes, and both were of the "physically harmful" or "potentially physical harmful" variety.

Harris, 964 F.2d at 1237. These admissions during the sentencing process are an example of reliable evidence that would permit a sentencing court to conclude that the defendant's guilty plea to a prior offense constituted an admission to a generic violent felony or crime of violence. But it does not follow from this proposition that any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR, or in an underlying police report or complaint application, precludes the court from finding that the defendant's guilty plea constituted such an admission. Such a result would be inconsistent with the preponderance of the evidence standard that generally applies when a court determines whether a defendant qualifies for an enhancement under the ACCA or career offender provision. *See United States v. Spell*, 44 F.3d 936 (11th Cir. 1995).

Therefore, the nature of the objection posed to a PSR, or to underlying documents relied upon by the government, must be considered carefully. The district court suggests that Shepard contested the accuracy of the facts in those documents that are relevant to whether he committed a generically violent crime. "At no point—then or now, during the various plea colloquies, or at this sentencing—did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaint." However, Shepard's Taylor-based categorical objection to the use of the complaint applications and police reports does not challenge the accuracy of the statements in those documents describing entries into buildings. Shepard stated that these documents generally carry a high risk of unreliability without ever explaining why that was true in his case. Shepard's general challenge to the appropriateness of the PSR setting

forth accounts of his past crimes, or to the reliance on police reports and complaint applications for those accounts, left those accounts uncontradicted, just as they were in Harris and Dueno.

We cannot anticipate the specific objections that Shepard might pose to the government's documents. We can emphasize, however, that the issue before the sentencing court is not what Shepard did to provoke the criminal charges to which he pled guilty. Rather, the issue, again, is the one framed in Harris: did the defendant and the government both believe at the time Shepard entered his pleas "that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue." *Id.* 964 F.2d at 1236. To conclude otherwise would enmesh the district court in the kind of factually disputed "archeological dig" about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions. *See Winter*, 22 F.3d at 19.

Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue. If the government needs to respond to such objections, the response should usually be "limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge." Spell, 44 F.3d at 939. To that list we add

transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue.

In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries into buildings. The government, of course, "bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," Dueno, 171 F.3d at 7.

III.

In Taylor, the Supreme Court said that the sentencing court could go beyond the mere fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." Taylor, 495 U.S. at 602. By examining the indictment or information and jury instructions in such cases, the court could conclude "that the jury necessarily had to find" that the defendant had been convicted of the violent felony of entry into a building, i.e. a violent felony. *Id.*

The concept of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Without minimizing the high stakes involved in sentencing enhancements, we note that courts routinely resolve factual disputes during sentencing hearings. We see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is

consistent with the principles of Taylor. We believe that we have described such an inquiry here.

In Taylor, the Supreme Court explained why it would be unfair for a sentencing court to look to the facts underlying the prior conviction to determine if a defendant had pled guilty to a violent felony. "Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." Taylor, 495 U.S. at 601-02. We, of course, agree. It would be decidedly unfair to determine subsequently, for the purpose of sentence enhancement under the ACCA or the career offender guideline, that the conviction resulting from a guilty plea was for a violent crime, based on the actual conduct of the defendant, when the defendant in fact pled guilty to a non-violent crime. But we see no unfairness in a court deciding on the basis of sufficiently reliable evidence that the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime, and hence the defendant's plea constituted an admission to such a crime.

We also see no unfairness in a point emphasized by the district court in its decision rejecting consideration of the police reports and complaint applications—namely, that Shepard had no appreciation of the importance of challenging the location of the breaking and entering when he pled guilty to the breaking and entering charges in the Massachusetts courts because he could not anticipate that his convictions for these charges would be so important for subsequent sentencing under the ACCA. Logically, the premise of this concern is that Shepard would have tried to minimize his criminal history because of the possibility that he would commit another crime. We do not find persuasive a fairness argument grounded in such a premise. Sentencing enhancements do not punish a defendant for the prior criminal

conduct. *See Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction."). Rather, enhancements provide for "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).

In summary, the court below concluded that it could not consider the police reports and complaint applications offered by the government because of its erroneous view that the violent felony determination could only be based on adjudicated or specifically admitted facts. The court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building. We therefore vacate the sentence and remand for resentencing.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

DEFENDANT'S SUPPLEMENTAL RESENTENCING MEMORANDUM

On July 14, 1999, this Court sentenced Mr. Shepard to 46 months in prison on hid guilty plea to a violation of 18 U.S.C. §922(g). The presentence report calculated Mr. Shepard's guide-line range to be 30 to 37 months with a Criminal History Category of 6. The government moved for an upward departure on the grounds that a CHC of six (6) did not adequately reflect the seriousness of Mr. Shepard's criminal history. The 46 month sentence imposed by the Court represented a two level upward departure from an adjusted base offense level of 12 to level 14; 46 months is the highest sentence available in level 14, with a CHC of six (6).

A. None Of The Records Of Shepard's State Convictions Establishes On Its Face Whether It Is For Generic Burglary.

Mr. Shepard did not challenge the constitutional validity of any of the convictions used to calculate his criminal history

category.[1] For purposes of calculating Mr. Shepard's criminal history, it made no difference whether his B&E convictions involved buildings. However, the government has succeeded in importuning the First Circuit to require this Court to look beyond the "mere fact of conviction" to determine whether Mr. Shepard qualifies for sentencing as an armed career criminal. Now fairness demands that Mr. Shepard be put in position to respond by challenging the government's claim that the pleas established facts not manifest in the state court record, even if that requires or involves a "collateral attack" on the state convictions themselves.

Mr. Shepard has filed an affidavit challenging the government's assertion that he admitted to the facts contained in the various police reports relied upon by the government. This Court is called upon to answer questions about what happened in these various state district courts at the time Mr. Shepard offered his pleas. This factual inquiry goes well beyond the fact of a prior conviction, see, *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-2363 (2000) and calls upon the district court to determine what happened in the state court plea proceedings concerning fact issues which have significance in this federal proceeding years afterward, but which were not necessarily addressed then because they are not necessarily elements of the crimes charged. Such a procedure offends due process in at least two ways: 1) it requires this Court to decide, by a preponderance of the evidence, whether Mr. Shepard was actually guilty of breaking into a building with the requisite criminal intent; and 2) it requires the Court to decide, by a preponderance of the evidence, whether Mr. Shepard actually admitted all of the facts and elements necessary to support a valid conviction for a "violent felony". Because proof of such facts would serve to enhance Mr.

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[1] Mr. Shepard acknowledges that such challenges to his convictions would have to have been brought in state court. *Daniels v. United States*, 121 S.Ct. 1578, 1583 (2001).

Shepard's sentence beyond the statutory maximum of ten years, to a mandatory minimum 15 years, the constitution requires that they first be charged and then proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-2363 (2000)("Other than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

B. Mr. Shepard Has A Cognizable Interest In Finality And Cannot Fairly Be Required To Litigate Whether Non-Elementary Circumstances Were Adjudicated In His Guilty Pleas.

In addition, this is an inquiry that has generally been forbidden to the federal district court, not because this Court lacks the competence to make the inquiry, but because the inquiry defeats the justice system's dual overriding interests in ease of administration and promoting the finality of judgments. *Daniels v. United States*, 121 S.Ct. 1578, 1581 (2001). The First Circuit has invited Mr. Shepard to mount various challenges to his state convictions in response to the government's resort to police reports and complaint applications as evidence of what his guilty pleas adjudicated. *United States v. Shepard*, 231 F.3d 56, 67-68 (2000) Of course Mr. Shepard is not ordinarily permitted to attack the validity of his state court convictions in the federal sentencing proceeding. *Custis v. United States*, 511 U.S. 485, 497 (1994) (". . . § 924 (e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions."); *Daniel v. United States*, supra, at 1580; see also, *United States v. Mateo*, 271 F.3d 11, 16 (1st Cir. 2001) (". . . [T]he sentencing guidelines do not compel district courts to inquire beyond the face of the state-court record. . . ."); *United States v. Correa*, 114 F.3d 314, 317 (1st Cir. 1997)(". . . [W]hen a federal court is obliged to tabulate a defendant's criminal history score for sentencing purposes, limiting the requisite

inquiry to the formal record . . . strikes the right balance."); United States v. Brackett, 270 F.3d 60, 65-66 (1st Cir. 2001). These criminal proceedings led to convictions without adjudication of whether the breaking and entering involved a building or a vehicle. The government now seeks, in effect, to collaterally reopen[2] these proceedings in an effort to prove that they involved factual circumstances which are not elements of the crime charged and which are not shown on the face of the judgment to have been established. Its effort to inquire into the judgments of the state court are as offensive to the system's interests in ease of administration and finality as any "collateral attack" raised by a defendant in a sentencing proceeding.

Of course the government has not been able to produce the record of the plea colloquies for the convictions at issue.[3] Thus, this Court is placed in the very same inappropriate position it would be in if Mr. Shepard attempted to challenge the validity of one of these ancient convictions:

> . . . [A] district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction. While petitioner is quite right that federal district courts are capable of evaluating fact-intensive constitutional claims raised by way of habeas petition . . . institutional competence does not make decades old state court records and transcripts any easier to locate.
>
> The facts of this case only reinforce our concern.

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[2] As Justice Souter points out in his dissent in *Custis*, "[t]he Court's opinion makes clear that it uses the phrase 'collateral attack' to refer to an attack during sentencing." 511 U.S. at 498, n.2.

[3] This Court has repeatedly called for the government to produce transcripts of plea colloquies and that remains a option even in light of the First Circuit's opinion in this case. 231 F.3d at 69.

> For example, petitioner contends that he entered his 1978 and 1981 guilty pleas without a full understanding of the essential elements of the crimes with which he was charged, and therefore the resulting convictions violated due process. . . . These claims by their nature require close scrutiny of the record below. Yet petitioner has not placed the transcript from either plea colloquy in the record. In fact, he has admitted that the 1978 transcript is missing from the state court file. . . . *Under these circumstances, it would be an almost futile exercise for a district court to attempt to determine accurately what was communicated to petitioner more than two decades ago.* (Emphasis added.)

Daniels v. United States, 121 S.Ct. at 1581.

No reason has been advanced by the government establishing why it should be permitted to undertake an examination of a state court judgment of conviction as intrusive and as revisionist as that which is forbidden to a criminal defendant at sentencing.

The unreliability of the records of Massachusetts District Court convictions is notorious, even when the inquiry is limited to whether the constitutional requisites were honored. In fact, the records of guilty plea proceedings are so poorly maintained and so frequently unavailable that the Supreme Judicial Court recently established a "presumption of regularity" which the challenging defendant must overcome, with credible and reliable factual evidence, before the Commonwealth is required to demonstrate that the defendant's constitutional rights were protected in the plea proceeding. *Commonwealth v. Lopez*, 426 Mass 657, 661-63, 665 (1998). In these circumstances, the government's argument that the Court should infer from police reports or pre-charging documents that specific circumstances were adjudicated in plea proceedings for which no record exists is simply not reasonable.

If the Court is authorized to investigate and adjudicate these issues in this sentencing proceeding, equity and due process require that other issues de hors the record be open to investigation. *Wardius v. Oregon*, 412 U.S. 470 (1973). For example, if defendant was not asked, during his plea colloquy, to personally admit the facts that establish the elements of the offenses, or the defendant was not informed of the elements of the offense to which he pled, his conviction is invalid:

> The defendant does allege, however, that the judge failed to ascertain that he had knowledge of the elements of the charges against him; the record bears this out. Nothing more need be shown to establish the inadequacy of the colloquy for constitutional purposes. *Henderson v. Morgan*, 426 U.S. [637] at 645-646, 96 S.Ct. at 2257-2258. . . .
>
> We conclude that the plea colloquy at issue was fatally deficient. [Footnote omitted] The defendant did not explicitly admit to or acknowledge any of the facts underlying the charges, and the judge did not advise the defendant of the nature of the charges, their elements, or the penalties involved. Nor was there any representation that the defendant's attorney had explained to him the elements he admitted by his plea. The record does not demonstrate that the defendant knew the exact nature of the charges to which he was pleading guilty.

Commonwealth v. Correa, 43 Mass.App.Ct. 714, 719-720, 686 N.E.2d 213, 217-218 (1997)(Reversing trial court denial of a motion for new trial); see also, *Mack v. United States*, 635 F.2d 20, 24-26 (1st Cir. 1980)(Prejudicial violation of Rule 11 occurred where court failed to determine that the defendant understood the nature of the charges).

There is no reason to assume, without the benefit of a formal record of the plea, that the facts constituting each element of the offense were admitted. See, *United States v. Payne*, 894 F.2d 534, 537 n. 7(D.Mass.1995)(pointing out the

"surprising infirmity" of Massachusetts state court convictions revealed by the increased scrutiny they have received in light of enhanced federal sentences). Problems with Massachusetts state court plea proceedings continue. Attached hereto is a ruling by Massachusetts District Court Judge Hodos date November 21, 2001, granting a new trial where the government failed to establish a factual basis for the offense and the court failed to inquire of the defendant whether she admitted to the facts and understood the elements of the offense.

There is reason to doubt the adequacy of the records of the pleas at issue in this case. Mr. Shepard denies that he admitted to the facts as recited in the various police reports and PSR. For example, with regard to Waltham District Court Complaint No. 9151CR1100, there are conflicting reports of Mr. Shepard's possession of a "master key". One report asserts that "when suddenly the door opened, standing there was suspect holding a master key." Another report states that "[a]ccording to both employee's [sic] this door was locked and the only way in was with a key which they *suspect* Shepard had in his possession." (Emphasis added) The longer report indicates the inability to locate an important cab driver witness and the absence of sufficient evidence that Shepard committed a larceny from the store. This suggests that the Commonwealth may not have been able to establish a factual basis for the requisite intent. The report suggested that Shepard be charged with "Breaking and Entering Fetters store on 3-11-91. . . ." If the defendant pled to simple breaking and entering, he pled to facts that do not constitute a crime. *Commonwealth v. Vinnicombe*, 28 Mass.App.Ct. 934, 935 (1990)("[T]he defendant was convicted by a jury of simply 'breaking and entering.' In the lexicon of Massachusetts crimes there is no such crime as 'breaking and entering' unaccompanied by intent to commit a felony or a misdemeanor.").

Mr. Shepard's affidavit challenges the government's claim that he admitted in each of these contested proceedings to having burglarized a building. The government's documents contain information casting doubt on the proposition that burglary was even a factually supportable charge in each case. It has failed to produce evidence from which the Court could reasonably infer that in each plea, it was adjudicated that Mr. Shepard burglarized a building, a fact which is not likely to have even been addressed except inadvertently because it is not necessarily an element of the crime charged. This Court should refuse to resort to this level of speculation; rather, it should find that the government has failed to meet its burden of proof, and reimpose the sentence originally determined to be appropriate.

Respectfully submitted,
Reginald Shepard, Defendant.

/s/ Linda J. Thompson
LINDA J. THOMPSON, BBO #496840
His Attorney
THOMPSON & THOMPSON, P.C.
1331 Main Street
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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing Motion, with Exhibits, was served on the government by first class mail, postage prepaid, on the 11th day of December, 2001.

/s/ Linda J. Thompson
LINDA J. THOMPSON, BBO #496840

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

AFFIDAVIT OF REGINALD SHEPARD
PERTAINING TO RESENTENCING MATTERS

I, REGINALD SHEPARD, being aware of the penalties for perjury, state on my oath that:

1. I am the same person who is named as the defendant in the above captioned case;

2. I have read the Boston Police Incident Report offered by the government with regard to Dorchester District Court Complaint No. 8907CR4433. The copy provided by the government was not very clear and I have trouble telling what some of the words are. However, I am sure that, at the time of my submission in Dorchester District Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the. truth of the information contained in the Incident report as part. of my plea and I have never. admitted in court that the facts alleged in the reports are true;

3. I. have read the Incident/Arrest Report dated 3/11/91 and Watertown Police Department report dated 3/21/91 submitted by the government in connection with Waltham District Court Complaint No. 9151CR1100. I have noticed

that the Incident/ Arrest Report states that "when the door suddenly opened, standing there was suspect holding a master key." I have also noticed that the Watertown Police Department report states "NOTE* According to both employee's this door was locked and the only way in was with a key which they suspect Shepard has in his possession. They believe that upon Shepards termination a few weeks prior he never turned his stores keys into [sic] the manager." Finally, I noticed that the Watertown Police Department report requests that I be charged with "Breaking and Entering Fetters store on 3/11/91 at 1450 hrs." but also states that there is not sufficient evidence to prove larceny. The only charge requested on the available evidence in "breaking and entering." I am sure that, at the time of my submission to sufficient facts in Waltham District Court, the judge did not read either the Incident/ Arrest Report or the Watertown Police Department report to me and did not ask me whether or not the information contained in those documents was true. I did not admit the truth of the information contained in those documents as part of my submission and I have ever admitted in court that the facts alleged in the reports are rue;

4. I have read the Boston Police Incident Report dated 7/17/91 that the government submitted in connection with Dorchester District Court Complaint No. 9107CR5135. I am sure that, at the time of my submission in Dorchester District Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the report are true;

5. I have read the Boston Police Incident Report dated 2/3/94 that the government submitted in connection with Dorchester District Court Complaint No. 9407CR00559. I am sure that, at the time of my submission in Dorchester District

Court, the judge did not read this Incident report to me and did not ask me whether or not the information contained in the Incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the report are true;

6. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (54) and (55) as paragraphs that I have read. I notice that no certified records were provided to the court by the government in connection with this alleged conviction at the time of my sentencing. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made as admission in any court that the facts set forth in these paragraphs are true;

7. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (59) and (59A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these. paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

8. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (69) and (69A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

9. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (71) and (71A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

10. I have read, the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (77) and (77A) as paragraphs that I have read. The presentence report does not assert the I admitted to the truth of the facts stated in these paragraphs and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

11. I have read the entire presentence report that was prepared by Ms. Bridgeman in my case. I refer specifically to paragraph (30) as a paragraph that I have read. The presentence report does not assert 'the I admitted to the truth of the facts stated in this paragraph and I affirmatively state that no court read these facts to me and asked me whether they were true or if I admitted that they were true. I have not made an admission in any court that the facts set forth in these paragraphs are true;

12. I have read the entire presentence report that was. prepared by Ms. Bridgeman in my case. I refer specifically to paragraphs (33) and (34) as a paragraphs that I have read. The government has not submitted certified copies of any documents with regard to these alleged convictions and the government did not rely on these convictions at my original sentencing hearing. At my original sentencing hearing on July 7, 1999, the government relied on five (5) convictions

for enhancement of my sentence and those were the convictions reflected in paragraphs (52)-(54), (56)-(57), (68)-(69), (70)-(71), and (75)-(76) of the presentence report. Certified copies of various documents were provided to the court in connection with every. conviction except the one alleged. to be reflected in paragraphs (52)-(54) of the presentence report and, for that conviction, no supporting documents were provided;

Signed under the pains and penalties of perjury this 13th day of December, 2001.

/s/ Reginald Shepard
REGINALD SHEPARD

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10185-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Boston, Massachusetts
December 13, 2001

TRANSCRIPT OF RESENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype with
computer-aided transcription.

[5] THE COURT: Okay. Well, I'd like to hear from you in writing, Ms. Pellegrini. I'd like to put off this decision.

Let me be quite candid. I am—I'm confused by what the Court of Appeals wants me to do. And if I can lay out what I think that the issues are, and then I'd be happy to hear from you, and then we'll set this down again. I'm sorry to delay it. It's delayed for such a long time, but I'm really not at all sure of what the Court of Appeals wants me to do.

The Court of Appeals is not overturning, obviously, Harris and Taylor. It seems to me that their inquiry is still the inquiry of what did Mr. Shepard plead to, not what did [6] Mr. Shepard actually do.

And in the conclusion of the decision, Judge Lipez reiterates that. The quote is somewhere—says that, "At the conclusion of the evidence the Court may decide it can conclude by a preponderance of the evidence that his pleas of guilty constituted admissions of unlawful entries of the buildings."

So, it looks like the focus is on what he pled to, not what he did. And, consistent with that, I have to look at the plea colloquy, of which I understand there is none.

If the police report were attached to the plea colloquy, then I could assume that Mr. Shepard had agreed to the contents of the plea colloquy and I could assume that that's what he pled to. But we don't have a plea colloquy. We have no way of reconstructing it.

So then the question is what do I do about the police reports.

Now, if the inquiry is what did he plead to and not what he did, and we can't show that the police reports were part of the plea colloquy, how are the police reports at issue, then, in this case? How do we use that if the inquiry is what he pled to.

There is language in the decision that suggests that the mere objection to the police—to the convictions in the presentence report are not sufficient. The defendant says that they object to the PSR's recitation of factual information [7] drawn from police reports and complaint applications. The implication in the decision is that that somehow is not enough.

Now, again, not enough for what purpose? Not enough to show what he did, or not enough to show what he pled to?

And the change in the affidavit which says—again, is focused on what happened at the plea—I read the Boston Police incident report; I'm sure no one read it to me; I don't admit to the truth of the information contained in it; I never admitted in court to the facts. Is that sufficient under the Shepard decision now, and then it is sufficient for what? If my inquiry is what he pled to rather than what he did, where does the police report come into all of that?

It occurred to me that one thing the Court may be saying, which is a little complicated, is—let me back off again.

So, first, the inquiry is what he pled to. The question is who has the burden of proving what he pled to? The absence of the colloquy then redounds in whose favor and whose disadvantage? And then what do I do about the police report?

Now, one way of interpreting Judge Lipez's decision is to say that what he's saying is that what Mr. Shepard has to do is to say, "I didn't do what they said I did." And then, unless he says that, he hasn't even—I'm not sure how he means it—put this in issue. That unless that—that he has to say, "I didn't say what they said I did," he has to deny it [8] on the merits. And from which I then infer that he, therefore, if he says, "I didn't do it," then I can then infer he, therefore, couldn't have pled to it, and, therefore, this conviction couldn't have been about that.

That strikes me as an enormous set of leaps; that he has to deny the merits of the underlying police report in order to ask the question that is central to the decision, which is what he pled to.

But that seems to be what the government said I should have to find. I have to find that he has to deny—he has to say, "I didn't go into a building, I went into a car.

Well, I didn't do what they said I did." And from that I can then infer that he couldn't have pled to it, and, therefore, the conviction could not have been about a house, it would have to be about a car.

But if he said that, if he came forward and said to me, "I didn't do what they said," what do we have, a trial here to determine whether he's telling the truth? And isn't that exactly what Taylor and Shepard prohibit, which is a mini-trial on the question of what the conviction is really about?

So, let me just sort of—let me make a list of my questions. My questions continue to be what am I resolving here? Am I resolving what he did or what he pled to?

If I'm resolving what he pled to, whose burden is it to prove what he pled to?

[9] If it is the defendant's burden, has he met that burden by this affidavit, or does he have to say more?

If it is the government's burden, have they met the burden by the police report, even if we can't reconstruct the colloquy.

Or are—so that's the—or am I totally off base about what this decision means? I suppose that's another possibility.

So, that's one box of what the decision was.

The second box here is Apprendi. And it seems to me that that's an argument that Ms. Thompson, really, you have to—you have to persuade me that the Supreme Court's decision in

Almendarez-Torres and my decision in Gomez-Estrada, which was affirmed a couple of weeks ago–

MS. THOMPSON: I'm familiar with it.

THE COURT: Right, doesn't eliminate that as an issue in this case. And, you know, it seems to me that—I don't see where Apprendi fits into this.

So that's my understanding what the issues are. I know that we're approaching the holidays. How much time do you need, Ms. Pellegrini?

MS. PELLEGRINI: I just need a week or so, your Honor. I don't think, frankly, with all due respect, that the issue is all that complicated.

THE COURT: You think the issue is what?

[10] MS. PELLEGRINI: The issue is—it is exactly what did the defendant plead to. And, quite simply, since we have—we're dealing with one statute. It's not a question of trying to determine, oh, my gosh, which statute did the defendant plead to, you know, that there's no indication of what the crime was, or anything like that. What we're merely trying to determine and what the Court has to determine is what portion of that statute was the government and the defendant talking about at the time he took his plea.

Because the burglary statute contains the two separate elements: The element of in a building, which is the violent offense, which is the one in question, which would allow for the enhancement of a sentence; or the vessel or car, which is not.

And what the government is saying and what I think Judge Lipez is saying is, quite simply, it's not a question of looking into the conduct, but what was before the Court so that you can make a determination as to what portion of that statute he pled to, knowing that, in fact, he did enter a plea to that statute.

So, all of the other issues raised in the supplemental memorandum regarding I wasn't advised by the Court seemed to me to be Custis issues and impermissible inquiry at this particular point in time. That if you're trying to determine what portion of the statute he pled to and what can [11] you rely on, what is reasonable and reliable and credible.

And I think Judge Lipez's decision underscores this.

What the government has always said is those documents that were before the state court at the time that it took his plea, those documents that come from its file showing that, in fact, the defendant was charged with that portion of the statute which says that he entered a building would allow you to reasonably conclude that, in fact, he entered a plea to that portion of that statute, because why—

THE COURT: This was before the judge in the plea colloquy? We don't know that. We know it's in the file.

MS. PELLEGRINI: No—well, we know it was in the file. Is the Court prepared to say, then, that the state court, having that in its file, would merely ignore it and take a plea to a portion of the statute which has nothing to do with the elements or the statement that before it?

And there's nothing that either the defendant or those documents show which would allow the Court to come to that conclusion that, in fact, the state court ignored what was before it and took a plea to a completely separate portion of the statute.

THE COURT: No, but the question is—the question is that the police report was unlitigated. No one challenged it, because there was a plea. So, if there was a version of the facts that was different, and that version didn't matter to [12] the outcome—

MS. PELLEGRINI: But that—

THE COURT:—as oftentimes happens, you plead to the generic crime.

The other issue is sort of an institutional issue.

Even if one believes in this case that—that, as you believe strongly, that it doesn't matter, the overarching question is that when do we look—when you're talking about a bump in sentence of the nature of the ACCA bump, was there some reason why the Supreme Court looked at the categorical test rather than relitigating the issues. And that reason had to do with, I think, sort of a generalized due process concern. That when there's a bump of that degree, we want to make sure that somewhere somehow the formalities were met.

MS. PELLEGRINI: Your Honor, in that regard, let me go back to Judge Lipez's statement, in which he says that the defendant might offer an account of what took place at his plea, including documents that raises questions about that issue, that issue being what was it that he pled to, not the circumstances under which he took the plea.

The fundamental due fairness argument that the Court has raised previously and that Ms. Thompson raises now seems to me, first of all, to spill over again impermissibly into a Custis inquiry, and without regard to the fact that the due process and the question of finality of the plea also works [13] with respect to what the government and the citizens of the United States have to have a right to expect, too, that there's some kind of finality to the plea.

So that at this point, that when this defendant comes before a federal district court judge, with these pleas, unchallenged previously—

THE COURT: Unchallenged previously, but what was there to challenge? He pled guilty.

MS. PELLEGRINI: Exactly.

THE COURT: But the implication of that is that, in a plea where one pleads to an ambiguous situation, the negotiated plea oftentimes may or may not reflect the same thing that a litigated trial would be. There are all sorts of things that are left unsaid.

MS. PELLEGRINI: Your Honor, but why is it that the Court would assume that what would be left unsaid here would be whether or not, with the entry into a building—because it's not as if a plea to burglary with respect to a vessel or a car is a lesser included.

THE COURT: Uh-huh.

MS. PELLEGRINI: So, why is it that one would assume that a plea would permit the defendant to plead to that—to facts which were not before the district court judge? Why would you assume that would take it completely out of the issue of the building or—in one case there was—in two cases [14] there were houses, in one case it was a business location—and say, okay, the defendant obviously, then, took a plea to entering a vessel or entering a car.

I mean, if we're trying to determine what that portion was, then that reliable evidence is before you, and what the defendant has done—has done nothing to disturb that.

THE COURT: Well, we now—the Court is using the language of admissions. We're trying to think about if this were a civil case, and someone had pled guilty in a criminal proceeding to a generic crime, and then there's a civil case afterwards, and we want to admit—we want to say that the person admitted to X conduct. The ambiguity of the—all that you'd look at in a situation like that is what was said in the plea colloquy. What did the person admit to. What comprises legal admissions to what facts.

And, as to a civil case, we would not even begin to look at, well, what was before the district court. It would be what was

said in court, what representations were made, and does that comprise a party admission under whatever the rule is.

And the question is then whether, in dealing with a criminal case, where so much hinges on it, I should go further.

Now, I drew a distinction in my initial decision when I, in fact, departed upward based on the record. But there [15] really is a difference between the analysis that one does—the everyday analysis that one does in a trial—in a sentence, but we're entitled to look at reliable evidence to determine if the record overstates or understates the culpability.

But that's different language than the ACCA language and different language than Harris and Taylor.

Now, I find Judge Lipez's decision ambiguous. As I said, it's hard for me to understand—and you're helping me, actually, along these lines—how the police report that was not introduced at the plea colloquy, and not admitted to, not referenced at that moment, can figure into an understanding of what it was he pled to.

And what you're saying is it has to be that, because nobody said anything different.

MS. PELLEGRINI: That's—

THE COURT: Because why would the judge accept a plea to—you know, well, we don't know what the basis of what the judge accepted the plea to, because there was no plea colloquy.

We don't know what was said at that occasion.

MS. PELLEGRINI: Your Honor, with all due respect again, I think that the Court's emphasis on the plea colloquy is overstated. Understanding that that might be quite helpful, the point of Judge Lipez's opinion is that notwithstanding the fact that there isn't a plea colloquy in these cases before the

[16] Court, the Court can, in fact, make a determination as to what elements of the statute the defendant entered its plea to by looking at other reliable evidence. And what the government is saying is that reliable evidence has been presented; that we have met our initial burden of proof; and, at that point, the burden does shift, to answer the Court's next question, to the defendant.

As Judge Lipez sets forth, you know, that he might, in fact—the defendant might present objections to it. And they set forth, although not an exhaustive list, a list of how they might do that.

THE COURT: Right.

MS. PELLEGRINI: But all of that goes to that—to that other issue and doesn't go to the Custis issues that are raised by Mr. Shepard in his affidavit.

So, I think that at this point we're right back where we were when the initial sentence was vacated; that there's reliable, credible evidence before the Court that the defendant has pled guilty to at least three crimes of violence in the past and that the sentencing enhancement should apply.

THE COURT: Let me tell you what I'm going to do while I'm waiting for your—because I want to get the record in Harris and Dueno. I want to understand what the Court meant when they said, "Did the defendant provide anything at his plea hearing to contest the facts—at the plea hearings to contest [17] the facts in the police report, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?"

I want to understand what about the record in Harris and Shepard—in Harris and Dueno led the Court to believe that somehow the defendant and the government were really on the same page as to what the defendant was pleading to. If

the record is as here, that would be one thing. But if, in fact, there they said in open Court yes this is what we've pled to, or something along those lines, that would be different.

But I want to understand exactly how the Court came to the conclusion that defendant and government were on the same page in those cases about what was pled to.

You're saying that it was because of the absence of a countervailing version of what happened in the record in the state court?

MS. PELLEGRINI: Well, actually, I think, in Dueno, though, it didn't go that far, because, in fact, in Dueno the government did not have what it has here.

THE COURT: Didn't have the police report.

MS. PELLEGRINI: Did not have the certified police reports. So that information was absent from the record before the district Court.

But I think Judge Lipez could not be clearer when he [18] says that, more specifically, after discussing Harris, did the defendant provide anything at his plea hearings. So, I'm assuming—we're not talking about this plea hearing, bviously, we're talking about those prior state hearings—to contest the facts set forth. And we have nothing.

THE COURT: But the question is whose burden is that? If it is your burden, the "nothing" means that there is no enhancement. If it is his burden, the "nothing" means that there is enhancement, or arguably. That's why I was caught up in the burden issue.

The decision is replete with references to going back to the plea colloquy. And so, the first question I had is, if I can't reconstruct that, what do I do?

And it looks like your answer is to say, well, we can't reconstruct that. But if the only thing in the file was this

police report, we can assume that the plea—that the plea was to the facts of the police report.

Boy, that's an assumption that is a troubling one to me.

MS. PELLEGRINI: Your Honor, again, I'm not so certain I see why it's so troubling. I mean, these documents—

THE COURT: It's not litigated by—

MS. PELLEGRINI: But that's the point. It doesn't have to be litigated. Because the question is what was there [19] to let the Court know what the defendant pled to?

We know he pled guilty to the burglary statute. So the only question is as to what portion. And so, why not look at the police reports, the incident report, the complaint, all of which are uncontradicted still, at this point, that the defendant entered a building, so that you can know that—

THE COURT: The question is whether or not Mr. Shepard has to say, "I didn't do the building, I did something else."

And if he said that, and if the defendant in the next case says that—let's assume that's what this case comes to stand for. What would the government do? Does that end the inquiry, or do you bring in the police officer to say, no, no, no, this was a building, or the complaining witness?

MS. PELLEGRINI: No, I'm not saying that the defendant gets up now and simply says, "Oh, I said I didn't do it," or whatever. Again, I think we are trying to construct something which, I think, is why the emphasis is on, well, did he contest it at the plea hearings, because we don't want to have to engage in that archaeological dig and rebuilding.

What we're looking at is what we had and what did the state court have before it at that time.

THE COURT: I see. So that the inquiry here is what he said—the defendant, in order to put this in issue, has to say,

"At the time of my plea I told them it was not a building, [20] it was a car."

MS. PELLEGRINI: Or, "And I contested it in some way." But not, "Oh, you know, here's the plea and you're right, here's all this information about entering a building.

But now I'm telling you"—well, actually, in Mr. Shepard's case, at this point in time he hasn't told us anything. He's never said he didn't enter those buildings. So—

THE COURT: But if we require—

MS. PELLEGRINI:—all of that is still there.

THE COURT:—defendants to say that, you really are in the area that the Court seems to be disproving that we get into. In other words, if somebody says, "I didn't do it. I pled to it because—you know, I didn't really do it," and then you have to bring in a police officer and I have to litigate a B & E from ten years ago, that's exactly what they don't want us to get into.

MS. PELLEGRINI: Your Honor, perhaps—I didn't mean to suggest that he should do that. All I'm saying is, even at this point, he hasn't even done that. So, where is the contest of the facts?

THE COURT: So, you're saying the contest here has to be I told them at the plea colloquy that it was X rather than Y?

MS. PELLEGRINI: Well, according to Judge Lipez's opinion, "Shepard might offer an account of what took place at [21] his plea hearings."

THE COURT: But, you see, he offers an account. And you say it's not so an account. He says nobody said anything, one way or the other. Doesn't that mean that, if you have the

burden, isn't that the end of it?

MS. PELLEGRINI: No.

THE COURT: He says, "Nobody said anything one way or the other, and since it didn't matter, I didn't contest."

MS. PELLEGRINI: No, your Honor, because I don't think he can simply just say, "No one said anything one way or the other," rotely, without specifics, and particularly in this case, where, if you read his affidavit, the language for each one is exactly the same, and say that it didn't take place. I don't think that's a meaningful contesting of the issues.

And I think that's, again, why this decision is quite clear that the finality of the plea—that there is this regularity of presumption that the plea went down the way it was supposed to go down, and that, in fact, it was a sufficient plea, that we're not going to relitigate it at this point, that we're not going to sit here and determine whether or not Mr. Shepard now says, "I didn't mean to enter a plea of guilty," but what would happen at that particular point in time for that plea, which remains uncontested.

THE COURT: Now, I'm—so it is as complicated as I suggested—

[22] MS. PELLEGRINI: No.

THE COURT:—because if it was—if you can presume the plea was regular, and it was certainly regular, but since the state court did not make the distinctions that we make here, it wasn't an issue. And so, it could have been regular. He could have had a lawyer. And since no one—since it didn't matter, no one said anything one way or the other.

MS. PELLEGRINI: But, your Honor, I think that again, in all of these cases, in fact, you don't have to think about whether or not he had a lawyer. I think that there are indications in those records that each and every time he was represented by counsel.

THE COURT: No, I'm not saying he wasn't.

MS. PELLEGRINI: All right. And also that for many of these convictions it indicates that he did, in fact, admit to sufficient facts.

And again, I don't—the greater leap, to me, is that one would consider that with those facts before the state court judge, that they would take a plea to an entirely separate set of facts.

THE COURT: No, what I'm saying is what if the facts were this. What if the situation were this, which is not unreasonable from what I recall from state practice. There is an indictment, which is general; there is a police report; [23] there is a great deal offered to the generic statute. You don't have to litigate what—the details of the police report, because it doesn't matter. This is not a lesser included offense. There's a plea colloquy, too. Did you agree to and they read the indictment? Did you do those things? And he says, "Yes."

MS. PELLEGRINI: Your Honor, why isn't that sufficient, when, knowing that the police report says you entered Fretters, you know, like 263 Commonwealth Avenue, to say that that's sufficient to say that both the government and the defendant understood that he was pleading to that portion of the burglary statute in which he entered a building?

THE COURT: Because—it may well be. And I'm not—I'm not—I'm genuinely struggling with this. It may well be.

But the issue is the defendant chooses to litigate or not litigate things in the course of a plea. And the decision not to litigate does not necessarily mean that it's true. And that's the problem that I'm having. The decision not to bother to litigate in a situation where it didn't matter in the state court does not necessarily mean that it's true.

MS. PELLEGRINI: Your Honor, I think that sort of analysis undercuts the plea, and I think it sort of bypasses the seriousness of a plea.

THE COURT: Well, I actually—I would agree with [24] you, except for the fact that what I did in this case was I departed upward because I thought there was a difference between the formality required for the ACCA and the formality required in evaluating an ordinary record. It made sense to me, as a matter of constitutional law, that the formality for the ACCA, where the bump is—the enhancement is so substantial, it made sense to the Court that Congress would talk about conviction and the Court would talk about plea and conviction, and that that was different from the language of the guidelines, which talked about reliable evidence.

So, it made sense that I could look below the surface of a conviction in one situation and not in another. And that's the issue that I'm—I mean, it seems to me the Court is saying look further, look deeper into the plea colloquy, and then it said the issue comes down to the issue that I'm saying, whose burden was it and is that burden met.

And you will say it has met a burden. It is meet by the facts. That the only accusation here was the complaint, the police report, and, therefore, we must assume that both the defendant and the government understood that that's what they were pleading to.

And I think that's an inference I can make by a fair preponderance of the evidence on this record.

[25] MS. THOMPSON: In fact, I think we all understand that if the Court has something before it, it means that the Court has something that it is considering, that it's for it's consid-eration, not simply in its file somewhere, as Mr. Shepard's letters to you came out of your file. That does [26] not mean that you're considering Mr. Shepard's letters because they're in your file, any more than the fact that you would be considering grand jury minutes if you had those.

The fact of the matter is all complaints have to start in some way. The complaints in the state district court start by a police officer coming in and asking for a complaint.

He attaches a document. Sometimes it's a police report.

That's it. That's what happens to that police report. It serves as the vehicle for obtaining a complaint. It doesn't go beyond that.

I have never, and I have been practicing in the state district court for—

THE COURT: You don't have to confess—

MS. THOMPSON: I won't confess, but I will say in excess of 20 years, and I have yet to see a judge pull a police report out of a file and do anything with it. In fact, most often they don't open the file. The docket is on the front of the file. They endorse the file. And the file is not even opened.

So, the first question here is did the court taking the guilty plea have before it the police report? There's no evidence that it had before it the police report. There is only evidence that there was a police report in the file as an aid to obtaining the complaint.

So, the first question can be answered by saying [27] there has been no evidence presented that it had the police report or complaint before it.

Where did the police reports come from? You know, what kind of questions are that to be asking Mr. Shepard?

Where did the police reports come from, Mr. Shepard? He doesn't know that. The government clearly is supposed to answer that question.

THE COURT: Well, she's answered it. She says it's in the file.

MS. THOMPSON: Right.

THE COURT: In the docket.

MS. THOMPSON: But how did they get into the file?

You know, that's the question. How did they get into the Court's file?

So, they are part of the file, but they are not part of the plea, as far as we can tell.

In addition to that, the third question is really a restatement of the second question. All right? What took place at Mr. Shepard's plea? More specifically, did the defendant provide anything to contest the facts set forth in the police reports, which, of course, weren't—the question there is were they before the court or not. Because if they weren't before the court, Mr. Shepard would not be contesting them; thereby suggesting that the government and the defendant did not share in understanding that he was pleading to an [28] offense that—and this is fairly key—had the elements—had the elements of a generically violent crime.

A building is not the only element of a generically violent crime here. And, as I've pointed out in our memorandum, when you talk, for example, about the Fretters report, if you look at the Fretters report, what you see is that there is a claim of a larceny during the time that Mr. Shepard was employed there. All right? And that as a result of that larceny, with no evidence that Mr. Shepard—to convince anybody that Mr. Shepard actually did it, Mr. Shepard lost his job. All right? Later he is supposedly—and there's a conflict in the facts listed in the reports, whether somebody saw him with the key or somebody believed he had a key or some employee left the door unlocked and said, gee, I always lock the door. Somebody came in here, had to have a key. We don't know any of that.

But we do know this: We do know that the police report in that case says we want a complaint for B & E. And I've

provided authority to the Court that there is no offense of B & E in the state of Massachusetts. There is no offense of B & E unaccompanied by an intent to commit a larceny or some other offense inside of the place that's being entered.

So, here we have a perfectly contestable case, a case that could have had a plea, in which there is no admission whatsoever to the intent to commit a felony inside—once [29] you're inside. And that could easily have happened. And, in fact, we had a conviction—

THE COURT: Well, why would he have pled to the generic crime?

MS. THOMPSON: For the same reason everybody pleads; to get it over with.

You say, "Did you go in there, Mr. Shepard?" "Yeah, I did."

"So, you actually went in. Okay, you went in. Fine. There's a factual basis. I accept."

Which is why I attached Judge Hodos's opinion, just as an example of a conscientious district court judge who lacked the factual basis to support a guilty plea. It was constitutionally invalid. If you took a plea to breaking and entering without anybody saying that they had an into to—they'd have it beat.

We have not contested the validity of these convictions. We know we can't do that. We're not allowed to do that under Custis. So, all of those convictions, all 39 points under the criminal history, were counted.

The fact of a conviction is not what's at contest here. And I think that's where we're getting lost. It's not the fact of the conviction that's being contested. It is the meaning of the conviction. And the meaning is different than the fact of it. What it was really, too.

[30] So, to the nonexhaustive list that Judge Lipez has here I think the Court should ad the inquiry, did the defendant admit to facts and elements constituting the offense, because that's the Taylor inquiry. Is there really an admission by the defendant. And that's an inquiry: Does this police report indicate that Mr. Shepard did, in fact, admit to the facts and elements constituting the generically violent crime?

I think it's really entirely unfair for the defendant to be charged with the absence of a record, whether he's attacking the conviction or the government is attacking the conviction. Mr. Shepard is not coming in here and saying, please don't count these convictions against me in my criminal history because, you know, take my word for it, they were invalid. I can't produce a transcript. The burden is on the government. Let the government come in and prove without a transcript that these were valid pleas. Mr. Shepard has not done that. All right?

The government has said, let Mr. Shepard prove that these were not valid pleas, and sorry that we waited so long to bring this up. One of these was a 1994 conviction that the government is claiming they—as I complained about at the time we were litigating this case, coming up to the trial, and you said to me, Judge, so, they waited three years to indict him. What's your complaint? Here's my complaint. That was one year after that plea. If they were interested—after the [31] state court plea in 1994. There was a 1994 plea.

If this case had been brought in 1995, when it happened, that record would have been available to the government. The government waited three years to bring this, and now they're complaining that the record is gone. That's not Mr. Shepard's fault. Mr. Shepard is not the one in here complaining that the Court doesn't have a record, and, therefore, his conviction should be treated as invalid. The government is in here complaining that there isn't a record, and that really is the government's problem.

Mr. Shepard has come in here and he has faced the Court, he has dealt with the 39 criminal history points. The Court enhances his sentence because of those 39 criminal history points. When the question was not what's the meaning of this question, but is there a conviction. Okay?

There was a conviction. The meaning of the conviction is an entirely different inquiry. And I think that that's one that Taylor clearly forecloses. And even though it was not brought to the Court's attention or, I believe, to the attention of the First Circuit, immediately following the Taylor decision there was the Payton case out of the Eighth Circuit.

The Payton case was a case in which the district court, in trying to decide whether or not to enhance Mr. Payton's sentence, looked at the police reports. Okay? [32] And they said, yup, you did the bad things. The police reports make it clear. And we're going to enhance your sentence.

So, the Eighth Circuit affirmed that sentence enhancement. The Supreme Court granted certiorari, remanded for re-consideration in light of Taylor. And the Eighth Circuit said, we clearly are wrong. You cannot consider police reports. That was within a year of Taylor being decided, Payton against United States.

So, there is a circuit court that has looked at this.

And the Supreme Court looked at it, saw there's police reports, we're going to send this back to you, you look at this in light of Taylor. And the circuit said, no, Taylor doesn't allow you to look at police reports. That was Payton against United States.

THE COURT: The First Circuit has obviously taken a different position than that.

MS. THOMPSON: I think they have obviously taken a different position. But, you know, I don't think that the—

THE COURT: And the question is whether or not the police report referenced here is—I look at the police reports, from which I then draw conclusions about what must have been going on at the plea, or do I look at the police report and ask the question whether the police report was part of the plea colloquy. If it's the latter question, then the question is who has the burden. If it's the former question, [33] it's a different one.

MS. THOMPSON: Well, I think that a fair question is put here. Did the court taking the guilty plea have before it the police reports?

Now, having before it means, to me, I would think, it's relevant in that proceeding. That it's in that proceeding, not just in the file. And that question can be answered on the state of the evidence we have now. The state of the evidence fails to establish that there was any reference to the police report anywhere by the Court taking the guilty plea.

Now, I have seen the extremes and the hustle that defense lawyers put into trying to challenge guilty pleas. Anything that you can come up with. Go to the judge, Judge, did you always or did you never do this?

And the judge will say, I don't remember. You know, I'm retired now. But what's the difference to you? And, you know, anything to try to establish that your client should not be saddled with that conviction.

I want to point out to the Court that Mr. Shepard hasn't done that. Mr. Shepard has said these—I'm not contesting the validity, and the mere—the fact of conviction is what we are dealing with. The fact of conviction is not being contested.

And that's where I think Apprendi comes in. Because [34] Apprendi does talk simply about the fact of conviction. And so does Custis. And so does Daniels. And those cases say—

in fact, I was looking at Custis. I think that Custis—that the Supreme Court has basically said in Taylor, in Custis and in Daniels, district courts do not relitigate what happened in state courts. They don't do that. They don't look at that. It's not because we want to hurt the defendant. It's not because we want to hurt the government. That's not what district courts do.

And, in fact, in the Custis case, citing with authority to the—what was this, the Tenth Circuit—said, "Federal courts are not forums in which to relitigate state trials." That's just a quote out of there.

Now, what we are saying here is Mr. Shepard can't do that, but the government can. The government can come in here and say to the Court, oh, we want to find out what Mr. Shepard really did. What did he really do?

I don't think Custis lets do you that, I don't think Daniels let you do that, and I don't think Taylor lets you do that. And I think those three lines of cases are very consistent with each other. You just don't do that.

Now, if you look at this police report, you look at these police reports, I think you cannot be satisfied by looking at the police reports that those are things that Mr. Shepard admitted to, what's contained in the police [35] reports. And unless Mr. Shepard admitted to those things, they are not usable to enhance his sentence under Taylor, because Taylor requires that either a jury found it or the defendant admitted to the facts and elements constituting the generically violent crime. And in Taylor, in the footnote, the Supreme Court recognizes that there's going to be a lot of times—in footnote 10—that you just can't get there this way. You can't enhance it as an ACC.

And they say, "Even if the enhancement is not available under 924(e), the government may still present evidence of the defendant's actual prior conduct to increase his sentence

for the 922(g)(1) violation or the federal sentencing guidelines.

So, the Court realizes that, you know, you're going to come up against this kind of thing. They talk about, in Taylor, Custis and Daniels, old convictions, where it's hard to know, where regularity may not be followed. But to have saddled Mr. Shepard with the absence of the record of the colloquy, whether he challenges it or whether the government challenges, just seems to me to be entirely unfair, an unfair thing to do.

[36] This Court is entitled, and there is nothing in the opinion of Judge Lipez that suggests that this Court is not entitled to say to the government, you know, the proof I want is the colloquy. That's what I want to see. I want to see [37] what Mr. Shepard admitted to, since all we have here is a generic plea.

You know, the government knows, and I know that a judge could very well look to Mr. Shepard and say, Mr. Shepard, did you break and enter a vessel, a building, or a vehicle or a ship belonging to Jerry Cothran. All right? And that would not be an admission to the necessary element. It would just be, you know, let's go ahead, I want my concurrent sentence, I want my probation, whatever it is. And it happens every day. So, the absence of a plea colloquy, the absence of a record, the thing we all depend upon, what we all our whole lives try to create, the Court and counsel, the record. The absence of a record in an inquiry like this seems to me to just be absolutely an incredible deficit for the Court to have to overcome. And to shift the burden to Mr. Shepard, who is not a lawyer, who is not trained in the law, to tell us all what happened at the plea, seems to me not something that the First Circuit could have had in mind.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

January 11, 2002

Criminal No. 98-10185-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD.
Boston, Massachusetts

TRANSCRIPT OF RESENTENCING PROCEEDINGS
BEFORE HON. NANCY GERTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	NADINE PELLEGRINI Assistant United States Attorney District of Massachusetts
For the Defendant:	LINDA J. THOMPSON, ESQ. Jacobson & Thompson, P.C. 1331 Main Street Springfield, MA 01103
U.S. Court Reporter:	HAROLD M. HAGOPIAN, RDR, CRR

Proceedings recorded by stenotype with
computer-aided transcription.

* * * *

[3] Mr. Shepard did file an affidavit with the Court. There was no affidavit filed by the government regarding its investigation or what might have taken place at Mr. Shepard's plea. And I think that that is significant because the Duano

[4] court does point out that that is something that the government might do to enlighten the Court. And the First Circuit points out that this Court also has the authority and the right to call for plea transcripts and colloquies to enlighten it about what happened at Mr. Shepard's plea hearing.

Then the thing that finally caught my attention regarding the Taylor case was that when Taylor spoke of the narrow range of cases in which the government—the government and the Court might look beyond the statute and the charging document, one of the things that it pointed out was that those cases would involve a situation in which the charging document charged only a burglary of a building, and did not charge anything else.

In this case, I believe that the best that the government has been able to show is that these police reports may have accompanied a request for a complaint to issue. These police reports, however, did not result in a complaint issuing which charged only the entry of a building.

These complaints—

THE COURT: The government—how—has the government established that the police report accompanied the complaint?

MS. THOMPSON: I—that's the thing they can establish, is that it was a request for the complaint. It's an application for the complaint.

[5] THE COURT: Okay.

MS. THOMPSON: Not that it accompanied the complaint, itself.

THE COURT: Okay.

MS. THOMPSON: But that it accompanied an application for a complaint.

With regard to the question of whether these documents were before the Court in a meaningful sense, to me, that means that they were something that the Court would rely on at the time of taking the plea. If it was before the Court that took the plea. Not merely in the file, the Court file, but actually before the Court that took the plea. That is, considered by the Court that took the plea.

There is no evidence whatsoever that these documents were considered by the Court that took the plea.

It would have been possible for the government to come forward with even affidavits regarding standard practice. It was my standard practice as a prosecutor to read the police report.

THE COURT: Uh-huh.

MS. THOMPSON: It was my standard practice as a district court judge accepting a plea to ask the prosecutor to read the police report.

There is no such evidence. There are no such affidavits before this Court indicating what function, if any, [6] the police reports had and illuminating the plea proceeding.

However, Mr. Shepard has done something that the Court—the First Circuit suggested he might do, which was Mr. Shepard might offer an account of what took place at his plea hearing, including documents before the judge. And Mr. Shepard did offer such an account, although it was that these documents were not part of the plea hearing that he was involved in, that is, the documents being the police report.

So I think that over all, when you look at the government's burden, the fact that the government seems to have faulted the defense here for not being able to come up with something more, with transcripts or other documents that were before the judge that accepted the plea. This is a case in which, as the United States Supreme Court said in the case of Mr. Urthy

(phonetic spelling) Daniels against the United States, that this is the kind of situation where, without the record below, it is futile -- I believe that that is the word that the Court used—it would be an almost futile exercise for a district court, meaning a federal district court, to attempt to determine accurately what was communicated to the petitioner in that case, more than two decades ago; but, in this case, some substantial amount of time ago.

The way I see Custis and Daniels entering into this proceeding is basically Custis and Daniels, as opposed to Taylor, which was focused on enhancement—Custis and Daniels [7] basically say this is not a function that is appropriate for the federal district court to be engaging in, is what is—what—trying to figure out what happened years ago in a state court proceeding. And that is why petitioners have been remitted to state court in order to challenge their convictions.

So that Mr. Shepard clearly can't come into this court and challenge his conviction. He has not done so. But, basically, what has happened is that the government has come in and made a challenge to the record.

The records which, under the plain language of Taylor, does not charge the kind of crime that could even be—that would call for you to go beyond the face of the documents, since it doesn't just charge entry of a building. Anything could have been the plea here, and it's our suggestion to the Court that the police reports in this case do not sufficiently illuminate the plea to make them reliable.

THE COURT: Okay. Thank you.

* * * *

[23] MS. PELLEGRINI: Just for clarification, so the government can determine its—the government does, of course, object to the Court's decision to resentence Mr. Shepard without the imposition of the armed career criminal statute.

There are eight convictions which the government has provided information about. I believe there are several others within the PSR. Is the Court saying that none of those convictions can the Court determine, based upon the information that it has been provided either through the PSR or through the government's submission, that the Court cannot determine that any of those crimes are, in fact, crimes of violence?

THE COURT: Let me ask you a couple questions, then. Do you have the plea colloquies with respect to any of them?

[24] MS. PELLEGRINI: No. The Court has everything that I have been able to obtain from the state court.

THE COURT: Is there any indication that the police reports that were provided—the incident/arrest reports that were provided were made part of the record during the plea colloquy?

MS. PELLEGRINI: I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy. All I have to determine what Mr. Shepard pled to are the factual statements either in criminal complaints or incident reports to help the Court determine which part of the burglary statute Mr. Shepard pled to.

And I guess my question to the Court is, is the Court saying—and I guess it is—that the defendant, by stating in an affidavit unvaryingly—the language does not vary—but simply, I did not state this, this was not read to me, that that is, in fact, reliable credible evidence, as opposed to the certified documents that we did obtain from the state court that relate to the charges that Mr. Shepard pled to?

THE COURT: The certified documents appropriately describe the police investigation and the police charges, and I don't doubt that they accurately summarize the police investigation and the police charges.

The inquiry before me is what Mr. Shepard pled to. And those police reports don't tell me what he pled to.

[25] MS. PELLEGRINI: So that if the—

THE COURT: His affidavit indicated that the police reports were never part of any plea colloquy in any of these cases. So the nuances of those reports—nuances that could spell 15 years for this man—were never addressed in the plea proceedings, never litigated, never described. He was never given an opportunity to say I agree with this, I disagree with that. And he is not now agreeing that that is what he pled to. And in a statute that tells me that consequences are triggered by convictions, I believe I have no choice.

So, yes, with respect to—if his affidavit addresses each of the charges that are at issue here, and tells me that—gives me the answer to the question what did he plead to, and the answer is he pled to the generic statute and not the police report, I don't believe I have a choice. As I said, to do otherwise—

MS. PELLEGRINI: Your Honor—I'm sorry.

THE COURT: And the next defendant will come here and say, that's not what I did. And then we have a trial in the United States District Court concerning what happened in Dorchester in, you know, 1995.

MS. PELLEGRINI: I'm sorry, your Honor, but is the Court saying that this affidavit provides to the Court that Mr. Shepard is saying I pled guilty to the nonviolent portion of that generic statute?

[26] THE COURT: No, no, I'm taking it at its word. It sees here, for example—where is it now—the judge did not read this incident report to me, didn't ask me whether the information—reading from paragraph 2—contained in the incident report was true. I did not admit the truth of the information contained in the incident report as part of my

plea, and I have never admitted in court that the facts alleged in this report are true.

And since you bear the burden of proving what he pled to, then you have not met that burden by showing to me a police report that was part of the application process.

That's my ruling.

MS. PELLEGRINI: That is your ruling.

THE COURT: Okay.

MS. PELLEGRINI: Fine.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 98-10262-NG

UNITED STATES OF AMERICA

v.

REGINALD SHEPARD

Attorney: LINDA J. THOMPSON

AMENDED JUDGMENT IN A CRIMINAL CASE

Note: The original sentence imposed on 7/14/99 was re-imposed for the reasons outlined in the attached memorandum and order.

X The Defendant Pleaded guilty to count(s): 1

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)	Felon in Possession of a Firearm	10/95	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall pay a special assessment of $50.00 for count(s) 1 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessment imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 021-54-8744

Defendant's Date of Birth: 4/21/62

Defendant's Mailing Address: none

Defendant's Residence Address: Wyatt Detention Center
Central Falls, RI

1/11/02 (Re-Sentenced)
Date of Imposition

/s/ _____
U.S. District Judge
Dated: 1/23/02

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 MONTHS ON COUNT 1.

X The Court makes the following recommendations to the Bureau of Prisons:

1. THAT THE DEFENDANT PARTICIPATE IN AN 500 HOUR COMPREHENSIVE DRUG TREATMENT PROGRAM.

X The defendant is remanded to the custody of the United States Marshal.

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____TO_____

AT_____with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

BY:_____

Deputy U. S. Marshal

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the bureau of prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the Probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (check if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the criminal monetary penalties section of this judgment,

The defendant shall comply with the standard conditions that have been adopted by this court (set farther below). The defendant shall also comply with the additional conditions on the attached page (if indicated below)

X see special conditions page 3.01

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without permission of the court or probation officer;

2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer,

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

SPECIAL CONDITIONS OF SUPERVISED RELEASE
(check all that apply)

X The defendant is prohibited from *possessing a firearm* or other dangerous weapon.

— The defendant is to pay the balance of the *restitution* according to a court ordered repayment schedule.

— The defendant is to pay the balance of the *fine* according to a court ordered repayment schedule.

— The defendant is prohibited from *incurring new credit* charges or opening additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

— The defendant is to provide the probation officer access to any requested financial information.

— The defendant is to serve __ months in home detention, *(either)* with electronic monitoring and pay a fee of $4.97 for each day under electronic monitoring.

— The defendant is to reside for a period of __ months in a community corrections center and shall observe the rules of that facility.

X The defendant is to participate in a program for *substance abuse* as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs.

X The defendant is to participate in a *mental health* program as directed by the United States Probation Office.

X The defendant is to participate in a *Certified Batterer's Intervention Program*, as directed by the Probation Office.

— The defendant is to complete __ hours of *community service* at an agency approved by the probation officer.

— The defendant is to meet with the *Internal Revenue Service* within the first __ days of the period of supervision in order to determine the prior tax liability and is to file tax returns and pay any future taxes due.

DEFENDANT: Reginald Shepard
CRIMINAL NO.: 98-10262-NG

STATEMENT OF REASONS

— The court adopts the factual findings and guideline Application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except: (see attachment if necessary): COURT DEPARTED UPWARD BASED ON ADEQUACY OF CRIMINAL RECORD. 4A1.3

Guideline Range Determined by the Court:

Total Offense Level:	12
Criminal History Category:	VI
Imprisonment Range:	30 to 37 MONTHS
Supervised Release:	2 to 3 YEARS
Fine Range:	$3.000, to $30.000.

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: N/A

N/A Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d)

N/A For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of title 18, restitution is

not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

N/A Partial restitution is ordered for the following reason(s):

— The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

— The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

X The sentence departs from the guideline range

— upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s):

4A1.3 ADEQUACY OF CRIMINAL HISTORY CATEGORY. SEE MEMORANDUM AND ORDER.

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

[Filed Jan. 23, 2002]

No. CRIM. 98-10262-NG

UNITED STATES OF AMERICA,

v.

REGINALD SHEPARD,

Defendant.

MEMORANDUM RE: RE-SENTENCING

GERTNER, *District Judge*.

On July 14, 1999, I sentenced Reginald Shepard to 46 months in prison after he pled guilty to a violation of 18 U.S.C. § 922(g) (felon in possession of a firearm).[1] With a criminal history of VI, the presentence report ("PSR") calculated Mr. Shepard's sentencing guideline range to be 30 to 37 months.

The government moved for two enhancements: First, it sought an enhancement to a 15 year mandatory minimum term under the Armed Career Criminal Act ("ACCA") 18 U.S.C. § 924(e) *16 ("§ 924(e)").[2] I rejected that

[1] Under 18 U.S.C. § 922(g)(1) ("§ 922(g)(1)"), it is unlawful for a person who has been convicted previously of a felony to possess a firearm.

[2] A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e):

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both ... such person shall be fined not more than $25,000 and imprisoned not less than fifteen years. . . .
>
> (2) As used in this subsection—. . .
>
> (B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

enhancement on the grounds that Mr. Shepard's conviction history did not meet the statutory requirements. I concluded that on the record before me, I could not determine that he had at least "three prior convictions . . . for a violent felony or serious drug offense" within the meaning of the statute. 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.

Shepard was charged with the crime of breaking and entering under Mass. Gen. L. Ch. 266 § 16, which outlines a generic breaking and entering offense, including offenses that qualify as predicate convictions under the ACCA, *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), namely, breaking and entering into a building, and offenses that do not, namely breaking and entering a car or vessel. While police reports attached to the applications for state criminal complaints suggested that at least five of Mr. Shepard's convictions involved a building, those details were not reflected in the complaints themselves. Rather, the complaints tracked the boilerplate language of the statute. Mr. Shepard pled guilty to the complaints.

After ruling against applying the ACCA enhancement, I invited the government to move for an upward departure on the ground that the criminal history score of VI did not adequately reflect the seriousness of Mr. Shepard's criminal history. Since it was clear that Mr. Shepard's record justified an upward departure, I granted the motion.

The sentence which I imposed represented a two level upward departure, from a level 12 base offense level to a level 14, with 46 months being the highest sentence available in the range. My reasons are recorded in *United States v. Shepard*, 125 F.Supp.2d 562 (2000) ("Shepard I").

The government appealed. The decision was then vacated and remanded in *United States v. Shepard*, 231 F.3d 56 (1st Cir.2000) ("*Shepard II*"). The First Circuit found that I had erred in two respects: First, Shepard I suggested that the trial court could never use police reports to determine the crime to which the defendant had pled (and therefore, the charge of which he was convicted). Second, *Shepard I* implied that in order for me to find that the defendant had admitted to the predicate offenses, at either the state plea colloquy or during the federal sentencing, the defendant had to admit to the offense explicitly ("in the sense of 'yes, I struck the victim in the face,'") *Shepard II*, 231 F.3d at 66.[3]

The court directed the consideration of police reports and complaint applications to determine if they "constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building." *Shepard II*, 231 F.3d at 70. The court also directed a review of the defendant's submissions at sentencing to evaluate whether, under the

[3] It was not my intent in *Shepard I* to imply either position although the decision could be fairly read to suggest these interpretations. I noted repeatedly that the ACCA's emphasis on convictions reflects a concern that facts which determine ACCA status had to have been litigated and subjected to the formalities of the criminal justice process before a defendant's sentence can be dramatically increased. While I confess to overstatement, what I meant by "the formalities" of the criminal justice process was that the ACCA's focus was on what the defendant had pled to or been convicted of, and not what he had actually done. (I noted that what the *Taylor* court described as the "categorical" approach, I was calling "focusing on the formalities of the record." *Shepard I*, 125 F.Supp.2d at 568.)

circumstances, the defendant admitted that he had pled to the predicate offenses. *Id.* at 66.

At the first hearing on remand, I addressed two issues: First, what was the question to be answered on remand? Was it--what did Mr. Shepard plead to? Or, was it—what did Mr. Shepard do to provoke the charges? Both parties agreed that the answer was: What did Mr. Shepard *plead* to on those prior occasions? Second, with respect to that question, who bears the burden of proof? With some qualifications noted below, both parties agreed that the government bears the burden of proof.

I also considered on remand two types of questions raised by the court—those which related to whether the police report was made part of, referred to, or used in any way in the plea colloquy[4] and those which related to whether Mr. Shepard admitted that he had pled to the predicate offenses.[5]

After two hearings, myriad briefs, and additional submissions of the parties, I have evaluated the police reports and complaint applications as well as the defendant's affidavit. I

[4] The Court noted: ". . . [D]id the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically . . . did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?" *Shepard II*, 231 F.3d at 68.

[5] The Court noted: "Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas." *Shepard II*, 231 F.3d at 69.

concluded that the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court? There is no evidence that the defendant and the government "shared [the] belief" that Shepard was pleading guilty to the unlawful entry of a building. *Shepard II*, 231 F.3d at 66.

As I describe below in greater detail, there was no transcript of the state plea colloquy, no presentence report containing the police reports, and no written plea agreement. The only account of the plea process that I have comes from the defendant's affidavit. The government offered no other version—no account from the state prosecutor or any other participant, no recitation of whether it was "standard practice" of the judge to review the report in open court. The defendant indicated that the police reports were never read or mentioned at his plea colloquies. They were never made a part of the plea process at all, either by way of exhibit or orally.

Furthermore, Mr. Shepard points to instances in which the reports were vague or obviously based on hearsay. Apart from the state plea colloquy, nothing the defendant said at the instant sentencing hearing or in his various court submissions qualifies as an admission that he had in fact pled to the crime of breaking and entering into a building in state court.

While I could not conclude by a fair preponderance of the evidence that Mr. Shepard had pled to the qualifying crimes of violence, I reiterated my conclusion that an upward departure was appropriate. Mr. Shepard's criminal history score, I found, understated the seriousness of his record under U.S.S.G. § 4A1.3, p.s. As a result, I reimposed the original sentence.

I. FACTS

Mr. Shepard pled guilty to a number of state offenses; at least five have been cited by the government as predicate offenses to ACCA. In each case, the state complaints tracked the Massachusetts statute (Mass. Gen. L. Ch. 266 § 16, 18,)[6] a statute which includes breaking and entering into a building as well as breaking and entering into a ship, vessel or vehicle. Case law under the ACCA identifies only breaking and entering into a building or other structure with intent to commit a crime as a crime of violence under the ACCA. *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In contrast, breaking and entering into a ship, vessel or vehicle is not a crime of violence under the ACCA. *Id.*

The government introduced certified copies of police reports related to four offenses. In some instances, these reports were made part of applications for complaints. Significantly, the complaints themselves did not reflect the

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[6] The relevant statutes provide:

Section 16:

> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a house of correction for not more than two and one half years.

Mass. Gen. L. Ch. 266 § 16 (2000).

Section 18:

> Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

Mass. Gen. L. Ch. 266 § 18 (2000). The statute was amended in November 1989 to include the "or motor vehicle" language.

information contained in the reports on the issues relevant to this case; in each case, the complaints just tracked the boilerplate language of the statute.[7]

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[7] The reports were as follows:

(1) *May 1989 Boston Police Report (paragraphs 58, 59 of the PSR)*:

> Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.
>
> Consistent with the police report, the complaint *application* states that the defendant was charged with "breaking and entering night" and that the property stolen or destroyed was a "cellar door." But the *complaint* itself says only that, on 5/6/89, the "defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Jerry Cothran, with intent to commit a felony therein."

(2) *March 1991 Watertown Police Report (paragraphs 68, 69 of the PSR)*:

> In reference to . . . a B & E & L from the FRETTERS store . . . reported on 3- 11-91 the following is submitted: A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal [sic] Shepard . . . enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot towards Arsenal street . . . According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession.
>
> After the incident, the managers did an inventory and found certain equipment missing.
>
> The complaint states that on 3/11/91, the defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Fretters, with intent to commit a felony therein.

(3) *July 1991 The Boston Police Report (paragraphs 70-71of the PSR)*:

> Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell Street. Upon arrival observed S/P (described above) walking away from above address . . . carrying a pink pillowcase . . . found pillowcase to contain property listed above . . . Officers checked bldg and found a panel on 3d floor front door had been broken in exposing inside door lock. When the officers entered the living room, they 'observed, in living room, areas where V.C.R. and phone were taken from' . . . also observed in bedroom one pink pillowcase missing from pillow.
>
> The complaint *application* states the defendant is charged with "b/e daytime" and the place is "258 Norwell St." The *complaint*, however, states that on 7/18/91, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with intent to commit a felony therein."

(4) *February 1994 Boston Police Report (paragraphs 70-77 of the PSR)*:

> [R]esponded to R/C [radio call] for a black male going door to door asking for an unk. person . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . [O]fficer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement.)
>
> The complaint application charges the defendant with "breaking and entering," and "wilful malicious destruction of personal property," at 145 Gallivan Blvd. The complaint stated, "on 2/3/94 the defendant did break and enter in the day time, the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein."

(5) *April 1989 (Paragraphs 53-55 of the PSR)*: The complaint application suggested that the defendant broke into the Crispus Attucks Children's Center by breaking a window and did put the Director the Center in fear and did take baby food, and certain equipment.

> The complaint however, states that on 4/2/89, "the defendant did break and enter in the daytime, the building, ship, or vessel of Crispus Attucks Children's Center with intent to commit a felony therein."

Mr. Shepard filed an affidavit on remand.[8] His affidavit focused on each of the police reports, which he reviewed one by one. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never read by the judge to him during the plea colloquy; nor was he ever asked if the information contained in the Incident Reports were true. He noted further that parts of the reports were ambiguous and based on hearsay.[9] He added with respect to each report: "I did not admit the truth of the information contained in the Incident Report as part of my plea and I have never admitted in court the facts alleged in the report are true."

No transcript of the plea colloquy was offered for any of the pleas cited by the government. The government represented that none was available. Likewise, no one offered any presentence reports which might have contained a police report or written plea agreements. There was no evidence suggesting that the police reports had ever been made part of the plea colloquy, in writing or orally.[10]

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[8] At the initial sentencing, the defendant objected to the "recitation of alleged factual information drawn from sources such as police reports and complaint applications," citing *Taylor*. On remand he submitted an affidavit, described above.

[9] With respect to the Watertown report, Shepard notes that part of the report is based on the hearsay statements of two employees (that a certain door was locked and "the only way in was with a key they suspect Shepard has in his possession", and that they "believe" upon Shepard's termination he "never turned his stores keys into [sic] the manager.") The employees did not see Shepard take anything; it was only after an inventory that they realized certain things were missing.

[10] A word about plea colloquies in the courts of Massachusetts: The defendant pleads guilty and is usually sentenced immediately. A presentence report is made available only if either party moves for it. See *Mass. R.Crim. P. 12*. There are rarely written plea agreements.

Apart from Mr. Shepard, no witness described what had occurred at the plea colloquy—no police officers, prosecutors or attorneys. In short, no document was offered rebutting Mr. Shepard's account of what went on.[11]

II. ANALYSIS

A. The Question to Be Answered on Remand Is: What Did Mr. Shepard Plead To?

The question on remand, and indeed, the central question under the ACCA is: What did Mr. Shepard plead to? As the First Circuit noted, the question is "not what Shepard did to provoke the criminal charges to which he pled guilty." *Shepard II*, 231 F.3d at 68.[12]

I will briefly review the ACCA case law and statutory language for two purposes—to put the government's arguments in context and to demonstrate the ways in which the

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[11] In *Commonwealth v. Quinones*, 414 Mass. 423, 608 N.E.2d 724 (1993) for example, a defendant filed a motion to withdraw his plea on the grounds that it was not a knowing and voluntary waiver of his constitutional rights. No transcript of the earlier plea colloquy was available. The vehicle containing the stenographic notes of the court reporter had been stolen. The trial judge denied the motion based on his "practice" in taking and accepting pleas of guilty and his "memory" of the proceedings. *Id.* at 424, 608 N.E.2d 724. The Supreme Judicial Court of Massachusetts affirmed on the ground that "[i]f the record is unavailable, it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken." *Id.* at 432, 608 N.E.2d 724.

[12] The First Circuit's question mirrors that of the Supreme Court in *Taylor*. The question in *Taylor* was, "whether, in the case of a defendant who has been convicted under a nongeneric—burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the government may seek enhancement on the ground that he actually committed a generic burglary." *Taylor*, 495 U.S. at 599-600, 110 S.Ct. 2143 (emphasis added). The Court answered: "No." The categorical approach of *Taylor* looks to what the defendant was convicted of, not what he did.

government's approach would require me to do precisely what *Taylor* and its progeny forbid.

The ACCA imposes a mandatory sentence of at least fifteen years, and up to life imprisonment for illegal possession of a firearm, by anyone who has three prior convictions for violent felonies or serious drug offenses. The linchpin is the word "conviction." While some judges believed that the "mere" fact of three prior felonies, without more, was not enough to make a career criminal, and hesitated or even refused to send the defendant to jail on that score alone,[13] the language of the Act and its legislative history was clear: Judges applying the ACCA should confine their identification inquiry to the conviction record--the number, type and timing of prior convictions. See James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L.Rev.1951, 1967 (1991) ("The ACCA contemplates an examination of the conviction record, and little else.") The Supreme Court reaffirmed this in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990): "We think the only plausible interpretation of [the ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction and that statutory definition of prior offense."[14] Calling the methodology the "categorical approach," 495 U.S. at 602, 110 S.Ct. 2143, the Court cautioned the judge against becoming embroiled in a "daunting" factual inquiry about what had actually happened at the time of the state offense,[15] particularly where the state offenses occurred some time ago. *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143. The aim was only to look to the "charging documents," not "plunge into the details of a particular defendant's conduct." *Shepard II*, 231 F.3d 58, 65 (citing *United States v. Winter*, 22 F.3d 15, 19 (1st Cir.1994)).

[13] *See, United States v. Wicks*, 833 F.2d 192, 195 (9th Cir.1987), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63(1988) (Pregerson, J., dissenting) ("I would . . . hold that something more than three convictions is required . . . Here, where two of the three convictions stemmed from burglaries that occurred on the same night, I would hold that [the ACCA] was not intended to, and therefore does not, apply."); *United States v. Balascsak*, 873 F.2d 673, 683-84 (3d Cir.1989) (Becker, J. concurring) (refusing to enhance the sentence unless the conviction history showed "the crimes (and the episodes of which they were a part) were truly separate").

[14] This focus on convictions and the statutory offense definitions under the ACCA is notably different from the methodology for determining criminal history departures under the chapter 4 of the Sentencing Guidelines. Recognizing the inadequacies of the criminal history scoring system, the Sentencing Commission encouraged departures in broad terms—where "reliable information" indicates that the criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s. "Reliable evidence" can include prior sentences that were not counted in the score, as well as "prior similar adult criminal conduct not resulting in a criminal conviction." Id. Police reports may well be an important source of "reliable information" for such departures. As I noted in *United States v. Footman*, 66 F.Supp.2d 83, 93 (D.Mass.1999), *aff'd. United States v. Footman*, 215 F.3d 145 (1st Cir.2000), however, the "reliable information" of "prior similar conduct" raises serious problems of its own.

[15] Indeed, the legislative history reflects a concern about broadening the inquiry beyond the conviction record. While some believed a record of conviction might predict recidivism, other factors which a court might take into account were less clear. Hooper, *Bright Lines, Dark Deeds*, 89 Mich. L.Rev. at 1963-64.

Where, as here, the state statute to which the defendant pled guilty did not track the federal definitions under the ACCA, the court was obliged to dig further. Nevertheless, the First Circuit has been clear about the limitations of "the dig": The judge may not hold a mini-trial on the particular facts underlying the prior offense, but he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a non-violent or a violent crime. *Dueno*, 171 F.3d 3, 5 (1st Cir.1999).

C. *The Government Bears the Burden of Proving What Mr. Shepard Pled To*

Plainly, the government bears the burden of "proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Shepard II*, 231 F.3d at 69 (citing *United States v. Dueno*, 171 F.3d 3, 7 (1st Cir.1999)), and thus, reconstructing the record. If the record is ambiguous, if it does not allow me to say one way or the other what Mr. Shepard agreed to plead to, then the enhancement should not apply.

The court's "peek beneath the coverlet" could involve one of three scenarios. If the defendant was convicted after a trial, the court is permitted to consider the jury instructions to understand what the plea consisted of. *United States v. Damon*, 127 F.3d 139, 142 (1st Cir.1997). If a guilty plea, the court may review the plea colloquy. *Id.* Or the court may review the defendant's statements or pleadings to see if they comprise admissions that the prior pleas were pleas to the predicate ACCA offenses. *United States v. Harris*, 964 F.2d 1234, 1236-37 (1st Cir.1992).

In this case, in order to decide what Mr. Shepard has pled to I must look in two directions: a) reconstructing the plea colloquy, and b) determining whether the defendant's responses (or failures to respond) to the PSR and the police reports attached thereto amount to an admission of the facts recited in the documents.

B. *Reconstructing the Plea Colloquy*

1. *Relationship of Police Reports to the Plea Colloquy*

The government offered certified copies of the police reports; at least five of these pleas, it suggested, were pleas to a crime of violence, breaking into a building.

The First Circuit has called for careful consideration of those reports. To the question, "may a sentencing court consider certified copies of police reports and complaint

applications to determine whether a defendant pled guilty to three prior 'violent felonies' qualifying for sentence enhancement under the [ACCA]," *Shepard II*, 231 F.3d at 58, the answer was plainly, "yes."

But the reverse position, which the government seems to urge, is not appropriate—that certified police reports are *all* that is needed, without proof that they were part of the plea colloquy, that they were exhibits to the colloquy, part of a plea agreement, or referred to by the judge or the prosecutor as part of the factual basis for the plea.

To be sure, the police reports offered by the government were certified. But certification established only that the document was an accurate copy of the police report. It does not answer the question: What did the defendant plead to? *Shepard II*, 231 F.3d at 60 n. 2. Neither does the parties' concession that the police report accompanied the application for a complaint, which made it part of the charging documents. In order to have persuasive evidence of what Mr. Shepard plead to, the police reports must have had some tangible relationship to the plea colloquy. This conclusion is clear from the questions that the Court posed as examples of the kind of inquiries I should make on remand:

> A) Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct?
>
> B) What took place at Shepard's plea hearings?
>
> C) Did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?

D) Where did the police reports come from?[16] *Shepard II*, 231 F.3d at 68.

2. *The Record: No Transcripts, State Presentence Reports, or Plea Agreements--Only Shepard's Affidavit*

A review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions. If the police report had been offered as part of the plea, had been an exhibit to the plea colloquy, or had been orally recited as part of the factual basis of the plea, then I could conclude that Mr. Shepard adopted those facts.

The problem is that there is no record of the plea colloquy. There is no formal plea agreement (to which a police report might have been attached). There was no state presentence investigation which may have clarified the factual basis for this plea. There is no rebuttal offered by the government to Shepard's account of what went on during the plea colloquy.

The only account is Mr. Shepard's, and he insists that the police reports were never mentioned during his pleas. Mr. Shepard's affidavit states unequivocally that the police reports offered here were never made part of the plea colloquy, never explained to him, and never acknowledged by him to be accurate at that time or at any other.

[16] To be sure, this question, taken out of context as described below, might suggest that all the government has to do is prove that the report was an accurate copy of the original—i.e., certify the report. As I suggest throughout, that interpretation of *Shepard II* would be inconsistent with the categorical approach. The police reports have relevance only insofar as they were part of the plea process or a federal presentence report to which the defendant did not adequately object.

3. *The Government's Position Is Inconsistent with United States v. Harris,*[17] *United States v. Custis,*[18] *and United States v. Daniels.*[19]

Nevertheless, the government wants the Court to infer that Mr. Shepard pled guilty to the facts contained in the various reports. It suggests that if the police report recited certain facts, namely, what happened and where it happened, and the defendant did not specifically deny those facts, he "must have" pled guilty to them. Or, it implies, since the police report included those facts, it is reasonable for me to assume that everyone—defendant and government—"must have" shared the intent to plead guilty to them. How could Mr. Shepard have pled guilty to breaking and entering at all if he were not pleading to those facts, they suggest? What facts could he have reasonably contested?

These inferences are not only unwarranted in the record; they are troubling. Since I do not know the specifics of what Mr. Shepard actually did (in terms of the crime), or what the state of the evidence against him was, or what other information the officers had, or what he was in a position to contest, in order to adopt the government's position, I would have to speculate about critical issues.

To take the facts as admitted in the police report because the defendant never specifically denied them during the plea would turn the plea process on its head. Mr. Shepard was never *asked* to deny or accept the facts that are of relevance to this federal proceeding. All that I can tell from the record is that he pled to the boilerplate complaint, phrased in terms of

[17] 964 F.2d 1234 (1st Cir.1992).

[18] 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

[19] 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001).

the general breaking and entering statute. As a matter of evidence law, this could hardly qualify as an admission.[20]

Indeed, the government's position is tantamount to placing the burden of proof on the defendant, and an extraordinary burden at that. He could dispel the inferences not by saying, "I did not plead to those details," as he has done, but only by saying, "I did not do this or that act as the police report says."[21]

Taylor expressly eschews such an approach—evaluating the actual course of conduct which triggered the criminal offense, making factual findings not necessarily ever made by the state court in federal court, and if the particular issues were not litigated in state court, litigating them in federal court. Indeed, the Court adopted the categorical approach even when it recognized the problem presented by the instant case--when a defendant pleads guilty but no record of the plea survived colloquy. *Taylor*, 495 U.S. at 601-02, 110 S.Ct. 2143.

Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic "bargains" after all, based on the sentence offered, the risks of trial, and the state of the evidence. As the Supreme Court noted, "In any case where the defendant pleaded guilty, there is often no record of the underlying

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[20] The only "admissions" category relevant here would be an "admission by silence." These admissions are admissible on the theory that a person would protest the statement made in his presence if untrue. M. Graham, 3 Handbook of Federal Evidence § 801.21 (5th ed.2001) (describing application of Fed.R.Civ.P. 801(d)(2)). Plainly, nothing that I know about Mr. Shepard's plea colloquy would justify such an inference.

[21] Even if I were to engage in the inquiry--the "must haves" that the government's analysis invites--I would conclude that these reports are sketchy, at best. With the sole exception of two of them (Watertown 1994, Boston 1991), they reproduce the hearsay accounts of witnesses on the scene.

facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Taylor*, 495 U.S. at 601-02, 110 S.Ct. 2143, cited approvingly in *Shepard II*, 231 F.3d at 69-70.

Other courts have confronted similar situations as the instant one and have rejected arguments similar to those made by the government. In *United States v. Shannon*, 110 F.3d 382 (7th Cir.1997), the defendant pled to statutory rape, which could include either consensual intercourse or forcible rape of a minor. While the complaint contained details consistent with the latter, the information to which the defendant pled alleged only statutory rape. The Ninth Circuit looked to the information, holding that "the information was the basis of the conviction and sentence and all its allegations were admitted and must be deemed established, while the complaint contains factual allegations that are contested and would require an evidentiary hearing to confirm." *Id.* at 384. Likewise, in the instant case, I am obliged to review only the indictment, and not the application for the complaint or police reports not made part of the record.

Or, in the case of a jury trial, if the jury instructions were lost, plainly the court is not authorized to review the transcript to determine what the trial "must have been" about or what the jury "must have" convicted the defendant of. The Supreme Court disapproved of such an approach in *Taylor*, 495 U.S. at 601, 110 S.Ct. 2143.

To be sure, a "*Taylor*-type" review of documents may include more than the charging document. *See e.g. United States v. Maness*, 23 F.3d 1006, 1009- 10 (6th Cir.), *cert. denied*, 513 U.S. 906, 115 S.Ct. 271, 130 L.Ed.2d 189 (1994) (reviewing transcript of guilty pleas and indictments to determine whether defendant actually committed generic burglary when he pled guilty to charges that contained all of

the elements of a generic burglary); *United States v. Rutherford*, 54 F.3d 370, 372 n. 4 (7th Cir.) *cert. denied*, 516 U.S. 924, 116 S.Ct. 323, 133 L.Ed.2d 224 (1995) ("If necessary to resolve an ambiguity in the charging document, the courts may also, in some circumstances, examine the presentence report, plea agreement, or factual findings of the sentencing court"); *United States v. Smith*, 10 F.3d 724, 733-34 (10th Cir.1993) (per curiam) (holding that "a court can look beyond the statutory count of conviction in order to resolve a patent ambiguity caused by a broad state statute"; however, the examination is limited to "the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge.")

But the government has cited no case that suggested that a police report not made part of a plea colloquy, not reflected in the complaint or indictment, and not adopted by the defendant in the presentence report or at any other time can comprise "*Taylor*-type" evidence for the purpose of determining whether the underlying conviction was for a crime of violence.[22]

A final note: The First Circuit and the Supreme Court have been clear about limiting collateral attacks on convictions during federal sentencing proceedings. *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) (holding that with the sole exception of convictions obtained

[22] I have found reference to the use of a police report as an independent piece of evidence, not as part of a formal proceeding or an admission in one case, *United States v. Richardson*, 230 F.3d 1297 (11th Cir.2000). In *Richardson*, the court found that a police report was reliable evidence to determine timing of offenses—to operationalize the statutory requirement that the three previous convictions be "committed on occasions different from one another" rather than be part of the same criminal episode. The issue in *Richardson*—the timing of offenses—is not easily determined by *Taylor's* categorical approach.

in violation of right to counsel, defendant in federal sentencing proceeding has no right to collaterally attack validity of previous state convictions used to enhance his sentence under the ACCA); *Daniels v. United States*, 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) (with the sole exception of convictions obtained in violation of right to counsel, motion to vacate, set aside, or correct sentence is not the appropriate vehicle for determining whether a conviction later used to enhance a federal sentence under ACCA was unconstitutionally obtained). If, on the one hand as in *Taylor*, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not *really* threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and even though nothing else apparently was discussed, what was *really* going on was a plea to a violent crime.

In conclusion, in answer to the specific remand questions: According to the defendant's affidavit and uncontradicted by any other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports or the details comprised therein. The defendant did not contest the facts in the police reports and complaint application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy.

The government has failed to meet its burden of proof with the submission of the police reports.

D. Did Shepard Admit That He Had Pled Guilty to a Crime of Violence Whether in the State Plea Colloquy or in this Proceeding?

Case law suggests that, in addition to trying to reconstruct the circumstances of the plea or the conviction, the government could establish what the defendant pled to through his or her admissions. *Dueno*, 171 F.3d at 6 (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission.") But if the central question is—what did the defendant plead to? —then it follows that the relevant admission need be similarly focused—an admission with respect to the subject of his guilty pleas, and not admissions about whether the defendant committed the underlying crime. The inquiry is still plea-focused. It is not about whether the defendant did the underlying crime. *Shepard II*, 231 F.3d at 66 ("the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. . . . *Harris* and *Dueno* leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime") (emphasis added).

1. *Objecting to the Presentence Report*

The presentence report lists the defendant's convictions. Beneath each line describing the conviction, the probation officer typically includes a description of the offense from the police report. If the defendant did not object to that portion of the presentence report, presumably he or she would be admitting that the convictions as described in the PSR are accurate--not just the fact of the convictions, but their nature as well.

That is what occurred in *United States v. Harris*, 964 F.2d 1234 (1st Cir.1992). The Court characterized the holding in

Harris as concluding that the PSR was "a reliable source for establishing *whether the defendant pled guilty to a violent crime* because the basic facts alleged in the PSR—i.e., that the defendant perpetrated a violent assault--were 'uncontested and uncontradicted.'" *Shepard II*, 231 F.3d at 65 (emphasis added). Since the PSR was uncontradicted, it was reasonable to conclude that both defendant and the government believed that the plea amounted to a plea to the generically violent crime.

In *Dueno*, the court found that the trial court erroneously concluded that the predicate offense was the violent version, breaking and entering a building, rather than the non-violent version, breaking an entering a car or boat, when the complaint to which the defendant pled could comprise either. Rather than remanding the case for additional fact findings, the government urged the court just to look to the PSR, as it had done in *Harris*, since the defendant never objected to it. The PSR characterized the offense in question as the violent version, breaking and entering a building.

The court refused, unwilling to engraft a finding of that seriousness to Dueno's failure to object to the PSR, because Dueno's failure to object to the PSR's account, the court found, was not enough to "ground a finding that [he] pleaded guilty to breaking into and entering a building." *Shepard II*, 231 F.3d 66 (quoting from **Dueno**, 171 F.3d at 7). A remand was ordered, in which the court pointed out several issues that the trial court needed to resolve.

The court's language is telling. Two of the problems the court noted related to the record before the judge who accepted Dueno's state plea. The evidence "did not include 'a single document that was before the judge who accepted Dueno's plea,' [and] there was no account of what took place at Dueno's plea hearing." *Shepard II*, 231 F.3d at 66.

But the court also mentioned, and this is the point the government emphasizes, that a third problem with the *Dueno* record was that the PSR included facts that were taken from the police report, but the record did not include the report itself.

From that general suggestion on the *Dueno* remand, the government makes two arguments: First, *all* that the government needed to do in order to meet the requirements of the ACCA, and the First Circuit case law, was to produce the certified police report to supplement the PSR. Second, once the government does so, the burden then shifts to the defendant to show the ACCA enhancement does not apply.

The government has taken the police report discussion in *Dueno*, later repeated in *Shepard II*, out of context. A certified copy of the police report may show that the PSR accurately describes what the police said in the police report and application for a complaint, and may be taken as an admission to the predicate offense—*if there is no objection from the defendant. But if the defendant objects*, as here, the police report alone cannot be used to establish what the defendant pled to or comprise an admission to the predicate offense.

To be sure, the court in *Shepard II* faulted Mr. Shepard's initial objections. Plainly, "any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR" is not enough to keep a court from finding that the guilty plea constituted an admission to those facts. *Shepard II*, 231 F.3d at 68. All that Mr. Shepard said in his initial objections was that any description of the convicted offenses, beyond the language of the charging documents, is inappropriate under the ACCA.

But Mr. Shepard elaborated on his objections during the resentencing proceedings. His affidavits focused on each of the police reports. He indicated that none of the details in these

reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never brought up. He noted further that parts were ambiguous and based on hearsay.

The government suggests that Mr. Shepard's additional affidavits are irrelevant at best, inadequate at worst. The only way the government can come to this conclusion is if it asked a different question—the very question which the United States Supreme Court and the First Circuit expressly do not ask. The only adequate response, according to the government, would be for the defendant to say—"I did not do the things described in the police report"—or else the facts of the report will be deemed admitted. Under this approach, it would not be enough for the defendant to say, as Mr. Shepard said here—"I did not plead to those facts because they were not brought up at my plea colloquy."

If what he actually did is the test, as the former response suggests, then this area of the law has come full circle. The defendant says: "I didn't do what the presentence report of convictions said I did" or "I did not do what the police report said I did." The government rebuts, and then I have a trial in my courtroom of state court offenses dating from years ago, the very "archeological dig" that the case law rejects.

Plainly, there are problems with the categorical approach; the enhancement does hinge on the "happenstance of state court record-keeping practices." *Shepard II*, 231 F.3d at 67. But that is unavoidable even if police reports, complaint applications, and other documents are considered. Defendants will always get a windfall when the police lose the police report or other underlying documentation. Any standard which, as in *Harris* and *Taylor*, seeks to reconstruct the record necessarily depends on the comprehensiveness of that record.

The Ninth Circuit had to address this in *United States v. Parker*, 5 F.3d 1322 (9th Cir.1993). Parker was found guilty of felon in possession of a firearm. The government sought to enhance under the ACCA, based in part on a 1968 conviction. The 1968 charging instrument noted that Parker and a co-defendant "enter[ed] a residence . . . with intent to commit theft therein," a violent felony under 18 U.S.C. § 924(e)(1). Parker, however, was convicted of the charge before a jury, but no jury instructions were available. The question was whether the court could look at the charging paper alone to determine the nature of the conviction when jury instructions were unavailable.

In a prior case, where the jury instructions were not available, the court held that the verdict form could be analyzed in connection with the charging paper. *United States v. Alvarez*, 972 F.2d 1000, 1005-1006 (9th Cir.1992) (where the charging instrument included allegations of the elements of generic "burglary" and the verdict stated that the jury found the defendant guilty "as charged in the information," there was enough evidence to establish that the conviction constituted burglary under section 924(e)).

But in *Parker*, the verdict form provided no information regarding the facts found by the jury. It merely referred to the statutory provision which had been phrased in generic terms. Thus, the court found that reliance on the "charging paper alone" to make the determination under the ACCA was not appropriate. *Parker*, 5 F.3d at 1327 And it added:

> Ultimately, whatever rule were adopted, someone—either criminal defendants or the government—would benefit from the loss or destruction of jury instructions. . . . Because we can assume that the problem of lost or destroyed instructions will affect primarily older convictions rather than recent ones, the rule we adopt is consistent with the general sentencing principle that he

> passage of time should dilute—and not magnify—the effect of past conduct on punishment for present acts.

Id. at 1328.

Surely the most reliable indicator of what the plea was about was the transcript and exhibits. But as the court noted, there are other ways of establishing the predicate offenses. A defendant may admit to the ACCA predicate or may be taken to have admitted to it through his failure to object to the PSR, as supplemented by a certified police record. The parties could reconstruct the plea through other means—the prosecutor's affidavit about what his usual practice was, the police officer who was present, etc.

But when a defendant denies that those police reports were part of the plea process and objects to probation's characterization of the offenses in the PSR, the government has to prove that there were predicate ACCA convictions. It has not done so here.

III. CONCLUSION

On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA.

Therefore, the original sentence I imposed on July 14, 1999 (46 months on Count I), was re-imposed on January 11, 2002, for the reasons stated above.

SO ORDERED.

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

No. 02-1216

UNITED STATES OF AMERICA,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Heard Jan. 7, 2003
Decided Nov. 3, 2003

Rehearing and Suggestion for Rehearing En Banc

Before BOUDIN, *Chief Judge*, TORRUELLA and LIPEZ, *Circuit Judges*.

BOUDIN, *Chief Judge*.

Under the amended Armed Career Criminal Act ("the Act"), 18 U.S.C. § 924(e) (2000), a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense." This appeal by the government concerns the proper application of these labels to Reginald Shepard"s prior guilty pleas under state burglary statutes. The issue is a recurring one.

On March 3, 1999, Shepard pled guilty to a charge of violating the federal statute prohibiting a felon from possessing a firearm, 18 U.S.C. § 922(g)(1) (2000). Shepard

had in fact sold a Glock 17, 9 mm pistol and ammunition to an undercover federal agent at South Station in Boston. Shepard already had on his record dozens of prior state convictions, including eleven for breaking and entering. The government sought to have Shepard sentenced as an armed career criminal, arguing that at least five of these breaking and entering convictions were violent felonies under the Act.

Under the Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include *inter alia* "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson or extortion . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court held that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Court described as "generic burglary"—unlawful entry into "a building or other structure, with intent to commit a crime." *Id.* at 598-99, 110 S.Ct. 2143.

At Shepard"s initial sentencing, the five convictions at issue were under one or the other of two Massachusetts statutes that forbid breaking and entering a "building," "ship," "vessel" or "vehicle" with intent to commit a felony.[1] In each of the state cases, the complaint merely charged Shepard in the boilerplate language of the statutes, leaving it unclear just what kind of structure Shepard had entered. Thus, the

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[1] One of the statutes says "motor vehicle" instead of "vehicle" but otherwise they are similar; the difference between them is that one statute, Mass. Gen. Laws ch. 266, § 16 (2000), is directed to breaking and entering by night and carries a 20 year maximum, while the other, ch. 266, § 18, has only a 10 year maximum and embraces breaking and entering during the day as well as non-forcible entry into a dwelling at night.

complaints alone did not reveal whether Shepard had broken into a building or some lesser enclosure such as a car or boat.

The "complaint" under Massachusetts procedure is the final step in the charging process, roughly equivalent to a federal information. 1 *Massachusetts Criminal Practice* § 4.1-4.2 (1998). Issued by a magistrate, the complaint is based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. *Id.* The application is customarily sworn and is automatically given to defendants at their arraignments. Mass. Gen. Laws ch. 276, § 22 (2000); Super. Ct. Standing Order 2-86; 1 *Massachusetts Criminal Practice* § 4.2, 16.5(C). Courts in Massachusetts can presume that defendants know the information contained in police reports. *See Commonwealth v. Brown*, 51 Mass.App.Ct. 702, 748 N.E.2d 972, 981 (2001).

Forewarned by an earlier decision of this court, *United States v. Dueno*, 171 F.3d 3 (1st Cir.1999), the government secured the state court files from Shepard"s earlier convictions, presented certified copies, and argued that the complaint applications and police reports contained in the state court files showed that Shepard"s prior convictions were for entries into *buildings* and so constituted generic burglaries under *Taylor*. Taking these documents at face value, they showed (with varying degrees of elaboration) the following as to the charges that had led to Shepard"s guilty pleas:

> May 1989. Break in at 30 Harlem St. in Boston; defendant discovered by an inhabitant in the pantry.
>
> March 1991. Entry into 550 Arsenal St in Watertown; defendant in back room of store.
>
> July 1991. Entry into 258 Norwell St. in Boston; defendant found in hallway with property taken from a broken-into apartment.

> February 1994. Attempted entry into 145 Gallivan Blvd; defendant found with arms through broken glass window.[2]

The district court ruled that the complaint applications and police reports could not be considered and declined to sentence Shepard under the Act, imposing instead a sentence of 46 months (which included a two-level upward departure). *United States v. Shepard*, 125 F.Supp.2d 562, 572 (D.Mass.2000) ("*Shepard I*"). On the government"s appeal, this court reversed, ruling that there was no "absolute bar" to consideration of police reports and complaint applications; the question, said the panel, was whether, in the contemporaneous understanding of the state and the defendant, Shepard had pled guilty in the breaking and entering cases to entry of a building (rather than, say, a motor vehicle). *United States v. Shepard*, 231 F.3d 56, 67 (1st Cir.2000) ("*Shepard II* "), *cert. denied* 534 U.S. 829, 122 S.Ct. 72, 151 L.Ed.2d 37 (2001).

On remand, the government filed additional complaint applications or police reports from state court files evidencing two additional convictions. According to these documents, one conviction was for a February 1981 break in to the Jamaica Plain High School gymnasium and the theft of property; the other was an attempted break in at 446 Shawmut Avenue where Shepard was found on the fire escape next to a window that had been pried open with a knife.

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[2] At the first sentencing hearing the government argued that Shepard"s conviction for an April 1989 break in to Crispus Attucks Children"s Center building should also be counted as generic burglary. Since the government did not provide the police reports or complaint applications for this conviction, only the PSR, it simplifies our analysis if we ignore this conviction for the present case.

Shepard submitted an affidavit saying essentially the same thing as to all of the alleged predicate charges:

> I am sure that, at the time of [the state court plea hearing], the judge did not read this Incident report to me and did not ask me whether or not the information contained in the incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the reports are true.

After these submissions, the district court imposed the same sentence as before. *United States v. Shepard*, 181 F.Supp.2d 14, 18 (D.Mass.2002) ("*Shepard III*"). The court emphasized Shepard"s affidavit denials that he had ever admitted in court the underlying facts of the crimes and concluded that "the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court?" *Id.* at 17, 19-20. The government again appeals, arguing that complaint applications and police reports establish that Shepard pled guilty to breaking into buildings.

There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard *in fact* broke in to half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question. Further, his string of convictions—which the district court described as "an 18-year crime spree," *Shepard I*, 125 F.Supp.2d at 565—shows that he is just the kind of burglar whom Congress had in mind in adopting the tough 15 year minimum sentence for armed career criminals. *Taylor* recounts in numbing detail the legislative history showing Congress" aim to apply the Act to repeat burglars later convicted of a gun crime. *Taylor*, 495 U.S. at 581-90, 110 S.Ct. 2143.

Congress" rationale was that a large percentage of all crimes are committed by repeat offenders; that many of these crimes have at least a potential for violence (*e.g.*, the burglar who encounters a resident in the house being burgled); that after a series of these crimes, the defendant is fairly described as a repeat offender; and that when a repeat offender then also commits a federal gun crime, it is time for that felon to serve a long prescribed minimum sentence. *Taylor*, 495 U.S. at 581-88, 110 S.Ct. 2143. Whatever the force of the theory, there is no doubt that Congress intended that it be implemented.

Yet *Taylor*, while construing the term "burglary" broadly (based on common usage rather than common law), narrowed the Act dramatically in another respect. Partly for practical reasons of administration, *Taylor* forbade a *de novo* inquiry by the sentencing court into what *conduct* the defendant actually engaged in incident to the predicate offense, and focused instead on whether the *crime* of conviction was *necessarily* a generic burglary (or some other crime of violence). *Taylor,* 495 U.S. at 599-602, 110 S.Ct. 2143. Admittedly, this simplifies administration if the state statute describes generic burglary and nothing else.

The problem—which *Taylor* recognized and addressed—is that state burglary statutes are often drafted to embrace both conduct that does constitute generic burglary and conduct that does not (*e.g.*, building versus vehicle[3]). *Taylor*, 495 U.S. at

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[3] Breaking and entering a vehicle is not generic burglary under *Taylor's* definition. 495 U.S. at 598-99, 110 S.Ct. 2143. Our circuit has never squarely decided whether burglary of vehicles or boats might still be grounds for enhancement under the Act because they "involve [ ] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), although prior dicta have suggested that they do not qualify as violent felonies, *see, e.g., Shepard II*, 231 F.3d at 59. Since the parties do not dispute this point, we assume it for present purposes, reserving always the peculiar problems posed by houseboats and camper vans, *see United States v. Peterson*, 233 F.3d 101,

599-602, 110 S.Ct. 2143. *Taylor* makes clear that where (as here) the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary *and* that is the crime of conviction in the particular case. *Id.* at 602, 110 S.Ct. 2143.

But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime? *Taylor* said that the sentencing court can still look at the charging papers and jury instructions, which together may well identify the crime of conviction. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. The Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed. Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents.

Let us start with basics. Under *Taylor*, a burglary conviction by a jury would count as a crime of violence under the Act if the indictment and instructions made clear that the burglary was of a house. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location.[4] It would also be true, as this court held in *United*

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110 (1st Cir.2000); *United States v. Sweeten*, 933 F.2d 765, 770-72 (9th Cir.1991).

[4] All twelve circuits that have addressed the issue have agreed that *Taylor* analysis applies after a guilty plea, even though *Taylor* only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials. *See United States v. Adams*, 91 F.3d 114, 116 (11th Cir.1996), *cert. denied* 519 U.S. 1047, 117 S.Ct. 623, 136 L.Ed.2d 546 (1996) (collecting and joining decisions from the 1st, 5th, 6th, 7th, 8th, 9th, and 10th Circuits); *United States v. Hernandez*, 218 F.3d 272, 278 (3rd Cir.2000); *United States v. Hill*, 131 F.3d 1056, 1064 (D.C.Cir.1997) (applying parallel U.S.S.G. career criminal provision);

States v. Harris, 964 F.2d 1234 (1st Cir.1992), even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house. *Id.* at 1236-37; *accord United States v. Coleman*, 158 F.3d 199, 202-03 (4th Cir.1998).

In *Harris*, Judge (now Justice) Breyer discussed the exact situation before us: a defendant who has pled guilty to violating a broadly worded statute that included both situations that would and situations that would arguably not be violent felonies. *Harris*, 964 F.2d at 1236-37. As with Shepard"s complaint, the indictment in *Harris* repeated the statutory boilerplate, leaving it unclear what category of offense was at issue. *Id.* The *Harris* court explained:

> In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.

Id. at 1236.

Judge Breyer then described the presentence report"s summary of the case files from Harris"s state convictions; these files (just like the complaint applications and police reports in Shepard"s case) made clear that the crimes were violent felonies—in *Harris*, that the defendant had twice physically assaulted the victim. *Harris*, 964 F.2d at 1236-37

United States v. Palmer, 68 F.3d 52, 59 (2nd Cir.1995); *United States v. Cook*, 26 F.3d 507, 509 & n. 5 (4th Cir.1994).

.On this basis alone, this court concluded that Harris's prior convictions were properly treated as violent felonies and (together with a third crime of violence) justified the 15 year minimum sentence prescribed by the Act. *Id.* at 1237.

In *United States v. Dueno*, 171 F.3d 3 (1st Cir.1999), this court arguably limited *Harris* in one respect. In *Dueno*, the government sought to characterize the predicate guilty pleas based not on the original police reports in the state court case files but rather upon the federal presentence report"s description of the underlying criminal conduct. *Id.* at 6-7. This had also been true in *Harris* but there no one had contested the reliance on the PSR. In *Dueno*, the court—though describing the issue as a close one—declined to allow the PSR alone to resolve the issue. *Id.* at 7.

The *Dueno* court endorsed *Harris's* general approach—as it had to do absent *en banc* review, *see Irving v. United States*, 162 F.3d 154, 160 (1st Cir.1998) (en banc), *cert. denied* 528 U.S. 812, 120 S.Ct. 47, 145 L.Ed.2d 41 (1999)—but it noted that not a single document from the original state court case files had been submitted for consideration, nor was there any other "account of what took place at Dueno"s plea hearing." *Dueno*, 171 F.3d at 7. Absent any indication that the PSR accurately repeated the information from the original state court documents, the *Dueno* court rejected reliance on the PSR's description of the criminal conduct to rescue an enhanced sentence whose primary ground was admittedly in error. *Id.*

Our *en banc* court sought to clarify our stance on presentence reports in a published order released shortly after *Dueno*.[5] We explained:

> Our cases have approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion) [citing *Harris*], where that determination cannot be made from the statutory language itself or from the charging documents, and only where the report was sufficiently reliable on this issue [citing *Dueno*].

United States v. Sacko, 178 F.3d 1, 7-8 (1st Cir.1999) (en banc order, June 16, 1999). While this order does not spell out what makes a PSR "reliable," and other circuits are split on this issue, *compare United States v. Adams*, 91 F.3d 114, 116 (11th Cir.1996) (relying on PSR), *with United States v. Potter,* 895 F.2d 1231, 1238 (9th Cir.1990), *cert. denied* 497 U.S. 1008, 110 S.Ct. 3247, 111 L.Ed.2d 757 (1990) (generally rejecting PSR), it does make clear two things: first, presentence reports can be used in some situations; second, *Harris* remains solid precedent in this circuit even after *Dueno*.

In Shepard's case the reliability of PSR descriptions is not even an issue, for the government secured the original state court case files from six of Shepard's prior convictions, found in them the complaint applications and police reports that had prompted the complaints, and made the latter available to the federal sentencing court (and so also to us). And Shepard has

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[5] This order was in response to the government"s motion for a rehearing *en banc* in *United States v. Sacko*, 178 F.3d 1, 7 (1st Cir.1999). *Sacko* was released three days before *Dueno* and was arguably in tension with the later opinion. Since the *Sacko* panel released an erratum altering the language in *Sacko*, our court denied the petition for rehearing, but took the opportunity "to make clear the en banc court"s view as to what is now settled law in this circuit." *Sacko*, 178 F.3d at 7.

been given a full opportunity (by the remand in *Shepard II*) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files.

Of course, it is barely possible that someone in Shepard"s position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary. Conceivably, at the plea hearing someone might have explained in mitigation that 258 Norwell Street was actually a boat dock address or, in a different instance, that Shepard"s target was not the Jamaica Plain High School gymnasium but merely a car parked in front.

This, we say, is conceivable but highly unlikely; and it is even less likely—to the point of nearly impossible--that it or anything like it happened for most of Shepard"s predicate pleas, and that the police reports were mistaken as to venue for four or more of the six crimes. Nor on remand did Shepard offer any evidence that this had happened; he said only that he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings.

Against this background, it is "clearly erroneous" to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.

In *Harris* Judge Breyer referred to what the government and defendant "believed" to be the subject of the predicate plea; but he did not suggest that this required direct evidence of the parties" subjective states of mind. *Harris*, 964 F.2d at 1236. His concern was with the nature of the proceedings: in upholding the enhancement *Harris* relied on objective evidence to characterize the pleas—namely, on police reports in the case files. Unimpeached, those files carried the day in *Harris*; they do so here as well.

Our view accords with that of the Fourth Circuit in *Coleman,* 158 F.3d at 202-03. In *Coleman*, the *en banc* court approved consideration of the "statement of charges" filed by a "complaining witness"—Maryland"s equivalent of Massachusetts"s complaint application—in order to determine whether the predicate crime qualified under the Act. *Id.* While the *Coleman* court mentioned that this document was formally considered part of the "charging papers" under Maryland law, we do not see how the label given to the document should make a difference, particularly in light of *Taylor's* forceful rejection of the use of state labels. *Taylor*, 495 U.S. at 590-92, 110 S.Ct. 2143.

Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*, with the reliability qualification adopted by *Dueno* as to the PSR (a point not litigated in *Harris* and irrelevant here), is the law of this circuit until the Supreme Court or an *en banc* panel rules otherwise.[6] On remand, the district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by Congress.

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[6] In addition to the tension between the two decisions, our own prior remand in *Shepard II* may further have complicated matters by not calling attention to the *en banc* order in *Sacko*. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court"s earlier mandate.

The sentence of the district court is *vacated* and the matter *remanded* for re-sentencing in conformity with this decision.

Docket for 03-9168

No. 03-9168	Status: GRANTED
Title:	REGINALD SHEPARD, *Petitioner*
	v.
	UNITED STATES
Docketed:	March 1, 2004
Lower Ct:	United States Court of Appeals for the First Circuit
Case Nos.:	(02-1216)
Decision Date:	November 3, 2003
Rehearing Denied:	November 24, 2003

Questions Presented

Date	Proceedings and Orders
Feb 23 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 31, 2004)
Mar 9 2004	Waiver of right of respondent United States to respond filed.
Mar 11 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 12 2004	Response Requested. (Due April 12, 2004)
Apr 7 2004	Order extending time to file response to petition to and including May 12, 2004.
May 7 2004	Brief of respondent United States in opposition filed.
May 19 2004	DISTRIBUTED for Conference of June 3, 2004.
Jun 14 2004	DISTRIBUTED for Conference of June 17, 2004.
Jun 21 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.

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SUPREME COURT OF THE UNITED STATES
GRANTED & NOTED LIST - CASES TO BE ARGUED
OCTOBER TERM 2004

As of June 21, 2004

105, Orig. *KANSAS V. COLORADO*
Order: 6/1/04 - Set for oral argument

02-1028 *CFX NORFOLK SOUTHERN RWY. CO. V. JAMES N. KIRBGY PTY.*
Court: USCA-11 Grant: 1/9/04

02-1192 *CFX COOPER INDUSTRIES V. AVIALL SERVICES*
Court: USCA-5 Grant: 1/9/04

02-1472)[1] *CFX CHEROKEE NATION OF OKLAHOMA V. THOMPSON, SEC. OF H&HS*

03-853)[2] *CFX THOMPSON, SEC. OF H&HS V. CHEROKEE NATION OF OKLAHOMA*
Court: 1USCA-10; 2USCA-Fed. *Grant:* 3/22/04

02-1672 *CFX JACKSON V. BIRMINGHAM BOARD OF EDUCATION*
Court: USCA-11 Grant: 6/14/04

03-184)[1] *CFX BALLARD V. CIR*

03-1034)[2] *CFX ESTATE OF KANTER V. CIR*
Court: [1]USCA-11; [2]USCA-7 Grant: 4/26/04

03-287 *CFX WILKINSON V. DOTSON*
Court: USCA-6 Grant: 3/22/04

03-377 *CFX KOONS BUICK PONTIAC GMC V. NIGH*
Court: USCA-4 Grant: 1/20/04

03-407 *CFX KOWALSKI V. TESMER*
Court: USCA-6 Grant: 1/20/04

03-409 *CFX KP PERMANENT MAKE-UP, INC. V. LASTING IMPRESSIONS, INC.*
Court: USCA-9 Grant: 1/9/04

03-583 *CFX LEOCAL V. ASHCROFT, ATTY. GEN.*
Court: USCA-11 Grant: 02/23/04

03-633 *CSH ROPER V. SIMMONS*
Court: SC-MO Grant: 1/26/04

03-636 *CFX JOHNSON V. CALIFORNIA*
Court: USCA-9 Grant: 3/1/04

03-674 *CFH JAMA V. INS*
Court: USCA-11 Grant: 02/23/04

03-710 *CFX DEVENPECK V. ALFORD*
Court: USCA-9 Grant: 4/19/04

03-725 *CFY PASQUANTINO V. UNITED STATES*
Court: USDC-Dist. of MD Grant: 4/5/04

03-750 *CFY SMALL V. UNITED STATES*
Court: USCA-3 Grant: 3/29/04

03-814 *CFX STEWART V. DUTRA CONSTRUCTION COMPANY*
Court: USCA-1 Grant: 2/23/04

03-878)[1] *CFH CRAWFORD V. MARTINEZ*
03-7434)[2] *CFH BENITEZ V. WALLIS, DIST. DIR., INS*
Court: [1]USCA-9 [2]USCA-11 Grant: [1]3/1/04; [2]1/16/04

03-892)[1] *CFX COMMISSIONER OF INTERNAL REVENUE V. BANKS*
03-907)[2] *CFX COMMISSIONER OF INTERNAL REVENUE V. BANAITIS*
Court: [1]USCA-6; [2]USCA-9 Grant: 3/29/04

03-923 *CSY ILLINOIS V. CABALLES*
Court: SC-IL Grant: 4/5/04

03-931 *CSH FLORIDA V. NIXON*
Court: SC-FL Grant: 3/1/04

03-1039 *CFH GOUGHNOUR V. PAYTON*
Court: USCA-9 Grant: 5/24/04

03-1116)[1] *CFX GRANHOLM, GOV. OF MI V. HEALD*
03-1120)[1] *CFX MI BEER & WINE WHOLESALERS V. HEALD*
03-1274)[2] *CFX SWEDENBURG V. KELLY*
Court: [1]USCA-6; [2]USCA-2 Grant: 5/24/04

03-1160 *CFX SMITH V. CITY OF JACKSON*
Court: USCA-5 Grant: 3/29/04

03-1164) *CFX VENEMAN, SEC. OF AGRIC. V. LIVESTOCK MARKETING*
03-1165) *CFX NEBRASKA CATTLEMEN, INC. V. LIVESTOCK MARKETING*
Court: USCA-8 Grant: 5/24/04

03-1293) *CFY WHITFIELD V. UNITED STATES*
03-1294) *CFY HALL V. UNITED STATES*
Court: USCA-11 Grant: 6/21/04

03-1407 *CFX ROUSEY V. JACOWAY*
Court: USCA-8 Grant: 6/7/04

03-1423 *CFX MUEHLER V. MENA*
Court: USCA-9 Grant: 6/14/04

03-8661 *CSY SMITH V. MASSACHUSETTS*
Court: AP-MA Grant: 6/14/04

03-9168 *CFY SHEPARD V. UNITED STATES*
Court: USCA-1 Grant: 6/21/04

NOTE:

No. of Cases made available for Argument: 39

No. of Hours made available: 31

CASE CODE KEY

■ First Letter = Jurisdictional Grounds (ex. 99-804 CFY)

C – Certiorari

A - Appeal

Q - Certified Question

■ Second Letter = Court Below (ex. 99-804 CFY)

S - State

F - U.S. Court of Appeals

T - Three-Judge District Court

M - U.S. Court of Appeals for the Armed Forces

O - Other Court

■ Third Letter = Nature of Case (ex. 99-804 CFY)

X - Civil

Y - Criminal

H - Habeas Corpus or other collateral attack